SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 716

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CLYDE SAYLOR, J. HENDERSON BROCK, JESS BLANTON SAYLOR, AND ALONZO WILSON

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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A In United States Supreme Court

No. 11208 U. S. District Court

UNITED STATES OF AMERICA, APPELLANT

vs.

CLYDE SAYLOR, J. HENDERSON BROCK, JESSE BLANTON SAYLOR, ALONZO WILSON, APPELLEES

Appeal From the District Court of the United States for the Eastern District of Kentucky

1 In United States District Court, Eastern District of Kentucky, November Term, 1943, At London

Indictment

Filed Nov. 22, 1943

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Eastern District of Kentucky, upon their oaths do find and present:

1. That on the 3rd day of November 1942, a general election was duly and legally held within and for the State of Kentucky, for the purpose of electing a United States Senator to serve in the Congress of the United States of America, as provided by the laws of the United States, and that pursuant to the laws of the State of Kentucky, a polling place was duly opened for the purpose of holding said election and voting in Molus precinct No. 32, Harlan County, Kentucky;

2. That at said election in said Molus precinct No. 32, Harlan County, Kentucky, many persons who were citizens and residents of the United States and of Harlan County, Kentucky, were entitled to cast their ballots and vote at said election for a duly qualified person who was then and there a candidate for the office of Senator of the United States, in that they were then and there duly registered as such voters and possessed all the necessary and requisite qualifications provided by the laws of the State of Kentucky to entitle them to vote for such person at said election in said precinct; that the names of all of said legal and qualified voters in said precinct who were entitled to vote for said condidate at said election are to the Grand Jurors unknown, and that those who are known to the Grand Jurors are too numerous to include in this indictment and that said persons will be hereinafter referred to in this indictment as voters.

3. That the said voters and each of them then and there possessed the right and privilege guarantees and secured to them by the Constitution and laws of the United States, at said election in said precinct, to choose and to vote for a candidate for the office of United States Senator to represent the people of the State of Kentucky and the United States in the Congress of the United States; and the further right and privilege to have their
2 said votes preserved, returned and recorded by the duly constituted and acting election officers in said precinct at said election, and honestly preserved; returned, recorded, counted, and given their intended effect and certified by the County Board of Election Commissioners within and for Harlan County, Kentucky, as the true result of said election in said precinct; that said voters and each of them then and there possessed the right and privilege guaranteed and secured as aforesaid to express by their votes their choice of a candidate as aforesaid and the further right and privilege to have their said expressions of choice accorded and given their full value and effect, that is to say, the right and privilege that the value and effect of their said votes and expression of choice should not be impaired, lessened, diminished, diluted, and destroyed by fictitious ballots falsely cast, counted, recorded, returned, and certified for a candidate opposed to the candidate for the office of United States Senator for whom the aforesaid voters had voted.

4. That at said election in said Molus precinct No. 32, Harland County, Kentucky, Clyde Saylor and J. Henderson Brock acted as the duly appointed and qualified Judges of said election, and Jesse Blanton Saylor acted as the duly appointed and qualified Clerk of said election, and Alonzo Wilson acted as the duly appointed and qualified Sheriff of said election at said precinct aforesaid, and that they and each of them then and there assumed their respective duties and obligations aforesaid as such Judges, Clerk, and Sheriff of election and acted and professed to act in their respective official capacities aforesaid, and then and there conducted said election in said precinct.

5. That on said date, to wit, the 3rd day of November 1942, at the voting place legally selected for voting at and located in Molus precinct No. 32, Harlan County, Kentucky, at the general election aforesaid, the aforesaid voters in said precinct at said election duly marked and cast their votes on the ballots provided for said purpose pursuant to law, for the duly and legally qualified person
3 who then and there was the Republican candidate for election to the office of United States Senator to represent the people of the State of Kentucky and the United States in the Congress of the United States of America, by appropriately, properly, and lawfully placing a cross mark on said ballots to

denote their desire to vote for and that they did legally mark their ballots and vote for said Republican candidate;

6. That on or about the 15th day of October, 1942, and continuously until and including the date of the returning of this indictment, at Molus, in Harlan County, State of Kentucky, in the Eastern District of Kentucky, and within the jurisdiction of this Court, they, the said Clyde Saylor, J. Henderson Brock, Jesse Blanton Saylor, and Alonzo Wilson, hereinafter referred to as defendants, did unlawfully, wilfully, knowingly, and feloniously conspire among themselves and with each other and with others whose names are to the Grand Jurors unknown, to injure and oppress divers citizens of the United States of America, namely the legal and qualified voters as herein defined of said Molus precinct No. 32, Harlan County, Kentucky, in the free exercise and enjoyment of the rights and privileges guaranteed and secured to them and each of them by the Constitution and laws of the United States of America, that is, the rights and privileges described and set forth in paragraph 3 of this indictment, and particularly the right and privilege to exercise the right of suffrage, to wit, to vote for a legally qualified person for the office of Senator of the United States to represent the people of the State of Kentucky and the United States in the Congress of the United States, which person was then and there a candidate for the same, and the right and privilege to have their said votes and each of them, for the person aforesaid, accurately, honestly, and truthfully preserved, recorded, returned, counted, and certified as actually and in fact cast.

That said felonious and unlawful conspiracy was in substance and effect as follows, to wit:

That previous to said date, to wit, the 3rd day of November 1942, and while said election was being held and conducted,
4 and while said legal and qualified voters were casting their ballots in said Molus precinct No. 32, at said election, and after the same had been so legally cast and had been duly placed in the ballot box of said precinct at said election for preservation, transfer, and delivery to the office of the Clerk of the County Court of Harlan County, Kentucky, to be there counted and certified by the Election Commissioners of Harlan County, Kentucky, the said defendants then and there and for the unlawful and felonious purpose of affecting, causing, and promoting a dishonest, incorrect, and fraudulent count of the votes of said legal and qualified voters and preventing the actual and intended choice of said voters from being expressed, did unlawfully, wilfully, knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and to then and there mark, forge, and vote the same for the candidate

of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely, and fairly cast, counted, and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged, and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified, and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election, so as thereby to diminish, impair, dilute, and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate, and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct.

That the purpose and object of said unlawfully and felonious conspiracy was further in substance and effect that they, the said defendants, would make a false and fraudulent return and report of said election by padding the ballot box with a large number of said falsely made and fictitious ballots; that they would also make a false and fraudulent report and return of said election and the manner of conducting the same, in order to induce and cause said Harlan County Board of Election Commissioner' to make a count of said false and fraudulent votes, by writing on the stub book the names of persons taken from the registration lists, thereby falsely showing that said persons had appeared at said precinct and demanded a ballot and voted in said precinct at said election, whereas, in truth and in fact, they had not done so; that they would make up and return such false, fictitious, and forged poll books, stub books, and ballots to the Harlan County Board of Election Commissioners, for the purpose of causing them to falsely count said fraudulent and fictitious votes, thereby effecting a fraudulent count of said votes by the County Board of Election Commissioners of Harlan County, Kentucky.

OVERT ACTS

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That to effect the object and purpose of said felonious and unlawful conspiracy, the defendants committed the following overt acts, to wit:

1. The said defendants, on the 3rd day of November 1942, at the voting place legally selected for voting at and located in Molus precinct No. 32, exercised their respective duties and obligations

as Judges, Clerk, and Sheriff of said election and assumed to act in their respective offices and capacities and then and there conducted said election.

2. The defendants, on the 3rd day of November 1942, at the voting place legally selected for voting in and located at the Molus precinct aforesaid, while the voters aforesaid and each of them were duly making out, marking, and casting their votes aforesaid for the legally qualified candidate of the Republican party for the election to the office of Senator in the Congress of the United States to represent the people of the State of Kentucky and the United States, and after said voting had been completed, illegally and corruptly removed a large number of said ballots from the official stub, poll, and ballot book, and unlawfully, wilfully, knowingly, corruptly, and feloniously marked and voted the same for the Democratic candidate for the office of Senator of the United States and deposited said ballots in the ballot box; that said ballots were not ballots voted at said election but were forged and fictitious and the inclusion thereof in the final count of ballots returned at said election deprived the aforesaid voters of the rights and privileges guaranteed to them by the Constitution and laws of the United States as hereinbefore described; that the said fraudulent and fictitious ballots were thereupon placed in the ballot box, together with the false and fraudulent report and returns of said election, and delivered by said defendants to the County Court Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to the County Board of Election Commissioners; that said false and fraudulent return of said ballots, stubs, and ballot book was so returned for the purpose of promoting and causing to be made a dishonest, incorrect, and unfair count, return, and certification of the result of the election in said precinct, which said count impaired, lessened, diminished, diluted, and destroyed the integrity and effectiveness of the ballots and choice of said voters as expressed by their ballot.

3. The said defendants on said date, to wit: the 3rd day of November 1942, by reason of the wrongful, fraudulent acts aforesaid, unlawfully, wilfully, knowingly, falsely, and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JOHN T. METCALF,
United States Attorney.

18–51.

7 No. 11208. United States District Court, Eastern District of Kentucky. The United States of America *vs.* Clyde Saylor, J. Henderson Brock, Jesse Blanton Saylor, Alonzo Wilson. Indictment—T. 18, Sec. 51 USCA. Unlawfully conspiring to injure citizens in the right secured to them by the Constitution and laws of U. S., to vote and have an honest count of their votes at an election for Senator of the U. S. 1 ct. A true bill, R. H. Barker, Foreman. Filed in open court this 22 day of November A. D. 1943. A. B. Rouse, Clerk, U. S. District Court. Ruby K. Middleton, Francis X. Jahn, H. M. Pennington, Sidney Held, W. M. Jones, Albert Howard, Larry Kerley, FBI Technical Laboratory Expert.

8 In United States District Court

Demurrer

Filed Dec. 14, 1943

Comes the defendants, and each of them, and without waiving their motion to quash filed herein but specifically relying thereon, and reserving all objections to the jurisdiction of the Court over the persons of the defendants and the subject matter of this action, demur to the indictment, and each count thereof, filed herein, upon the following grounds:

1. That neither the said indictment, nor any count thereof, states facts sufficient to constitute a crime against the United States.

2. That said indictment is duplicitous, in that more than one separate and distinct offense is charged in the various counts in the indictment.

3. That none of the paragraphs of the indictment states facts sufficient to constitute a criminal offense against the United States and do not state any violation of the laws of the United States, and that said indictment, and each count thereof, contains mere conclusions and does not plead facts, and that said allegations are irrelevant, immaterial, extraneous, prejudicial, and argumentative.

4. That said indictment fails to describe and to particularize the alleged combination and conspiracy to violate laws of the United States and particularly the terms and provisions of Title 18, Section 51, U. S. C. A. (Section 19 of the Criminal Code), or the alleged attempt or the alleged combination and conspiracy with sufficient definiteness and certainty and so specifically as to enable these defendants to prepare and make their defense thereto, and to plead an acquittal or conviction thereunder in bar of any other proceeding against them based on the same matters or

9 things, or any of them, on which the indictment is based.

5. That said indictment fails to describe and to par-

ticularize the alleged combination and conspiracy, or the means allegedly agreed upon to accomplish the purpose thereof, with sufficient definiteness and certainty, and so specifically as to charge an offense against the United States, so as to enable this Court, from an inspection of the indictment, to ascertain whether, if carried into effect, the alleged means would constitute a violation of the laws of the United States and particularly Title 18, Section 51, U. S. C. A. (Section 19 of the Criminal Code.)

Wherefore, the above-named defendants pray for an order sustaining the above demurrer to the indictment filed herein, and for all other proper relief incident thereto.

GOLDEN and LAY,
HARRY B. MILLER,
Attorneys for Defendants.

10 In United States District Court

Order sustaining demurrer

Filed Dec. 20, 1943

This cause coming on to be heard upon the defendants' demurrer to the indictment herein, briefs having been considered and the Court having heard oral arguments thereon, is of the opinion that Section 51, Title 18, United States Code Annotated (Section 19, Criminal Code), upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants herein, and it is, therefore, ordered that the demurrer be and it is hereby sustained, to which ruling the plaintiff, United States of America, objects and excepts.

H. CHURCH FORD, *Judge.*

11 In United States District Court

Memorandum opinion

Filed Jan. 6, 1944

On December 20, 1943, an order was entered sustaining a demurrer to the indictment herein.

The purpose of this memorandum is to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code, 18 U. S. C. A. § 51, the statute upon which the indictment is founded.

The general allegations of the indictment are, in substance, that an election was held in Molus precinct No. 32, Harlan County, Kentucky, on the 3rd day of November 1942, for the purpose of

electing a United States Senator at which many legally qualified citizens and residents of that precinct cast their votes; that defendants who were the election officers, unlawfully conspired with each other, and with other persons whose names are to the grand jury unknown, to injure and oppress divers citizens, qualified voters of the precinct, in the free exercise and enjoyment of rights and privileges guaranteed and secured to them by the Constitution and laws of the United States. These general allegations are followed by a specific description of the particular acts charged to constitute the alleged crime as follows:

12 "* * * the said defendants then and there * * * did unlawfully, wilfully, knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and to then and there mark, forge, and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely, and fairly cast, counted, and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged, and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified, and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election, so as thereby to diminish, impair, dilute, and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate, and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct."

The overt acts alleged are that at the time and place of the Congressional election described in the indictment, the defend-
13 ants, as officers of the election, conducted it in the exercise of their respective official duties; that they illegally and corruptly removed a large number of ballots from the official ballot book and forged and voted them for the Democratic candidate for the office of Senator of the United States and deposited them in the ballot box which they delivered to the County Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to and counted by the County Board of Election Commissioners, and that they, "by reason of the wrongful, fraudulent acts aforesaid, unlawfully, wilfully, knowingly falsely, and corruptly caused and in-

duced the Board of Election Commissioners of Harlan County, Kentucky, to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate."

The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

That the rights of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights "secured by the Constitution" within the meaning of and protected by section 19 of the Criminal Code, is not open to question. Ex parte Yarbrough, 110 U. S. 651, United States v. Mosely, 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute (United States v. Classic, 313 U. S. 299).

14 But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

In United States v. Bathgate, 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy "to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation" and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty or integrity of Congressional elections, but "the right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, * * *."

The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19

of the Criminal Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as "ballot box stuffing." According to the established policy of Congress, as interpreted by the Supreme Court in the Bathgate case, the protection of the public from such type of election is left to State laws (United States v. Gradwell, 243 U. S. 476; Chavez v. United States, 261 F. 174 (8 Cir.); United States v. Kantor, 78 F. (2d) 710 (2 Cir.); Steedle v. United States, 85 F. (2d) 867 (3 Cir.)).

H. CHURCH FORD, *Judge.*

In United States District Court

Order allowing appeal

Filed Jan. 18, 1944

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment and order in the cause sustaining the demurrer of the defendants to the indictment therein, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the Court ordered and adjudged, that the plaintiff herein, the United States of America, be, and it is hereby allowed an appeal from the order and judgment of this Court sustaining the demurrer of the defendants to the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered, that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at Lexington, Kentucky, this 18th day of January 1944.

By the Court:

H. CHURCH FORD,
United States District Judge,
Eastern District of Kentucky.

17 In United States District Court

Petition for appeal

Filed January 18, 1944

Comes now the United States of America, plaintiff herein; and states that on the 20th day of December 1943, the United States District Court for the Eastern District of Kentucky entered a judgment and order sustaining a demurrer to the indictment herein, and that the United States of America, feeling aggrieved at the ruling of the District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the Court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

UNITED STATES OF AMERICA,
JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

18-30 In United States District Court

Assignment of errors

Filed January 18, 1944

Comes now the United States of America, by John T. Metcalf, United States Attorney for the Eastern District of Kentucky, and avers that in the record proceedings and judgment and order herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the court erred in sustaining the demurrer to the indictment.

2. That the court erred in holding that there is "no federal statute which covers the reprehensible election fraud commonly referred to as 'ballot box stuffing.'"

3. That the court erred in holding that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is [not] a Constitutional right to which Congress intended to afford pro-

tection by the provisions of section 19 of the Criminal Code (18 U. S. C. 51) of the United States."

4. That the court erred in holding "that section 51 of Title 18, United States Code Annotated (section 19, Criminal Code), upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses [of knowingly and wilfully conspiring to cause a false count of the votes cast at an election for the purpose of electing a United States Senator, by placing in the ballot boxes false and fictitious ballots] charged to have been committed by the defendants herein."

JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

31–32 In United States District Court

Order filing notice of appeal, etc.

Filed January 19, 1944

Came John T. Metcalf, United States Attorney for the Eastern District of Kentucky, United States Attorney for the Eastern of Appeal, Citation, and Praecipe for Transcript of Record, service of each of which is shown on the face thereof to have been accepted by Harry B. Miller, counsel for the Appellees, and the Court being advised,

It is ordered that same be now filed and noted of record herein, and the Clerk will include this order in the record on appeal.

H. CHURCH FORD, *Judge.*

33 (Citation in usual form showing service on Clyde Saylor et al., omitted in printing.)

34 In United States District Court

Praecipe for transcript of record

Filed January 19, 1944

To the CLERK, United States District Court for the Eastern District of Kentucky:

The appellant, the United States of America, hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Kentucky, you include the following:

1. Docket entries and minute entries showing return of the indictment, filing of demurrer thereto, entry of order sustaining demurrer, and filing of memorandum opinion of Judge Ford in reference to order sustaining demurrer.
2. Indictment.
3. Demurrer.
4. Order sustaining demurrer.
5. Memorandum opinion of Judge Ford in reference to order sustaining demurrer.
6. Petition for appeal to the Supreme Court.
7. Statement as to the jurisdiction of the Supreme Court.
8. Assignment of errors.
9. Order allowing appeal.
10. Notice of service on appellees of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.
11. Citation.
12. Praecipe.

JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 19 day of January 1944.

HARRY B. MILLER,
Counsel for Appellees.

35 (Clerk's certificate to foregoing transcript omitted in printing.)

36 In the Supreme Court of the United States

October Term, 1943

No. 716

Statement of points to be relied on and designation of record

Filed March 8, 1944

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

CHARLES FAHY,
Solicitor General.

37 Supreme Court of the United States

No. 716, October Term, 1943

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CLYDE SAYLOR, J. HENDERSON BROCK, ET AL.

Order noting probable jurisdiction

March 6, 1944

The statement of jurisdiction in this case having been submitte and considered by the Court, probable jurisdiction is noted, an the case is consolidated with No. 717 for hearing.

[Endorsement on cover:] File No. 48209. D. C. U. S., Easter Kentucky. Term No. 716. The United States of America, Appe lant, *vs.* Clyde Saylor, J. Henderson Brock, Jess Blanton Saylo and Alonzo Wilson. Filed February 18, 1944. Term N 716 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 717

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE POER, SIDNEY SOLOMON POPE, ODELL JAMES SHEPHERD AND VERLIN FEE

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

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A In United States Supreme Court

No. 11209—U. S. District Court

UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE POER, SIDNEY SOLOMON POPE, ODELL JAMES SHEPHERD, VERLIN FEE, APPELLEES

Appeal from the District Court of the United States for the Eastern District of Kentucky

1 In United States District Court, Eastern District of Kentucky

November Term, 1943, At London

Indictment

(Filed Nov. 22, 1943)

The Grand Jurors of the United States of America, duly impaneled, sworn, and charged to inquire within and for the Eastern District of Kentucky, upon their oaths do find and present:

1. That on the 3rd day of November 1942, a general election was duly and legally held within and for the State of Kentucky, for the purpose of electing a United States Senator to serve in the Congress of the United States of America, as provided by the laws of the United States, and that pursuant to the laws of the State of Kentucky, a polling place was duly opened for the purpose of holding said election and voting in Pansy Precinct No. 53–A, Harlan County, Kentucky.

2. That at said election in said Pansy precinct No. 53–A, Harlan County, Kentucky, many persons who were citizens and residents of the United States and of Harlan County, Kentucky, were entitled to cast their ballots and vote at said election for a duly qualified person who was then and there a candidate for the office of Senator of the United States, in that they were then and there duly registered as such voters and possessed all the necessary and requisite qualifications provided by the laws of the State of Kentucky to entitle them to vote for such person at said election in said precinct; that the names of all of said legal and qualified voters in said precinct who were entitled to vote for said candidate at said election are to the Grand Jurors unknown, and that those who are known to the Grand Jurors are too numerous to include in this indictment and that said persons will be hereinafter referred to in this indictment as voters.

3. That the said voters and each of them then and there possessed the right and privilege guaranteed and secured to them by the Constitution and laws of the United States, at said election in said precinct, to choose and to vote for a candidate for the office
2 of United States Senator to represent the people of the State of Kentucky and the United States in the Congress of the United States; and the further right and privilege to have their said votes preserved, returned and recorded by the duly constituted and acting election officers in said precinct at said election, and honestly preserved, returned, recorded, counted, and given their intended effect and certified by the County Board of Election Commissioners within and for Harlan County, Kentucky, as the true result of said election in said precinct; that said voters and each of them then and there possessed the right and privilege guaranteed and secured as aforesaid to express by their votes their choice of a candidate as aforesaid and the further right and privilege to have their said expressions of choice accorded and given their full value and effect, that is to say, the right and privilege that the value and effect of their said votes and expressions of choice should not be impaired, lessened, diminished, diluted, and destroyed by fictitious ballots falsely cast, counted, recorded, returned and certified for a candidate opposed to the candidate for the office of United States Senator for whom the aforesaid voters had voted.

4. That at said election in said Pansy precinct No. 53–A, Harlan County, Kentucky, Clarence Poer, and Sidney Solomen Pope acted as the duly appointed and qualified Judges of said Election, and Odell James Shepherd acted as the duly appointed and qualified Clerk of said election, and Verlin Fee acted as the duly appointed and qualified Sheriff of said election at said precinct aforesaid, and that they and each of them then and there assumed their respective duties and obligations aforesaid as such Judges, Clerk, and Sheriff of election and acted and professed to act in their respective official capacities aforesaid, and then and there conducted said election in said precinct.

5. That on said date, to wit, the 3rd day of November 1942, at the voting place legally selected for voting at and located in Pansy precinct No. 53–A, Harlan County, Kentucky, at the gen-
3 eral election aforesaid, the aforesaid voters in said precinct at said election duly marked and cast their votes on the ballots provided for said purpose pursuant to law, for the duly and legally qualified person who then and there was the Republican candidate for election to the office of United States Senator to represent the people of the State of Kentucky and the United States in the Congress of the United States of America, by appropriately, properly and lawfully placing a cross mark on said bal-

lots to denote their desire to vote for and that they did legally mark their ballots and vote for said Republican candidate.

6. That on or about the 15th day of October 1942, and continuously until and including the date of the returning of this indictment, at Gulston, in Harlan County, State of Kentucky, in the Eastern District of Kentucky, and within the jurisdiction of this Court, they, the said Clarence Poer, Sidney Solomen Pope, Odell James Shepherd, and Verlin Fee, hereinafter referred to as defendants, did unlawfully, wilfully, knowingly, and feloniously conspire among themselves and with each other and with others whose names are to the Grand Jurors unknown, to injure and oppress divers citizens of the United States of America, namely the legal and qualified voters as herein defined of said Pansy precinct No. 53-A, Harlan County, Kentucky, in the free exercise and enjoyment of the rights and privileges guaranteed and secured to them and each of them by the Constitution and laws of the United States of America, that is, the rights and privileges described and set forth in paragraph 3 of this indictment, and particularly the right and privilege to exercise the right of suffrage, to wit, to vote for a legally qualified person for the office of Senator of the United States to represent the people of the State of Kentucky and the United States in the Congress of the United States, which person was then and there a candidate for the same, and the
4 right and privilege to have their said votes and each of them, for the person aforesaid, accurately, honestly, and truthfully preserved, recorded, returned, counted, and certified as actually and in fact cast.

That said felonious and unlawful conspiracy was in substance and effect as follows, to wit:

That previous to said date, to wit, the 3rd day of November 1942, and while said election was being held and conducted, and while said legal and qualified voters were casting their ballots in said Pansy precinct No. 53-A, at said election, and after the same had been so legally cast and had been duly placed in the ballot box of said precinct at said election for preservation, transfer, and delivery to the office of the Clerk of the County Court of Harlan County, Kentucky, to be there counted and certified by the Election Commissioners of Harlan County, Kentucky, the said defendants then and there and for the unlawful and felonious purpose of affecting, causing and promoting a dishonest, incorrect, and fraudulent count of the votes of said legal and qualified voters and preventing the actual and intended choice of said voters from being expressed, did unlawfully, wilfully, knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and

to then and there mark, forge and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely, and fairly cast, counted, and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged, and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified, and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election, so as thereby to diminish, impair, dilute, and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate, and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct.

That the purpose and object of said unlawful and felonious conspiracy was further in substance and effect that they, the said defendants, would make a false and fraudulent return and report of said election by padding the ballot box with a large number of said falsely made and fictitious ballots; that they would also make a false and fraudulent report and return of said election and the manner of conducting the same, in order to induce and cause said Harlan County Board of Election Commissioners to make a count of said false and fraudulent votes, by writing on the stub book the names of persons taken from the registration lists, thereby falsely showing that said persons had appeared at said precinct and demanded a ballot and voted in said precinct at said election, whereas, in truth and in fact, they had not done so: that they would make up and return such false, fictitious and forged poll books, stub books, and ballots to the Harlan County Board of Election Commissioners, for the purpose of causing them to falsely count said fraudulent and fictitious votes, thereby effecting a fraudulent count of said votes by the County Board of Election Commissioners of Harlan County, Kentucky.

OVERT ACTS

And the Grand Jurors aforesaid, upon their oaths aforesaid, do further find and present:

That to effect the object and purpose of said felonious and unlawful conspiracy, the defendants committed the following overt acts, to wit:

1. The said defendants, on the 3rd day of November 1942, at the voting place legally selected for voting at and lo-

cated in Pansy precinct No. 53–A, exercised their respective duties and obligations as Judges, Clerk, and Sheriff of said election and assumed to act in their respective offices and capacities and then and there conducted said election.

2. The defendants, on the 3rd day of November 1942, at the voting place legally selected for voting in and located at the Pansy precinct aforesaid, while the voters aforesaid and each of them were duly making out, marking, and casting their votes aforesaid for the legally qualified candidate of the Republican party for the election to the office of Senator in the Congress of the United States to represent the people of the State of Kentucky, and the United States, and after said voting had been completed, illegally and corruptly removed a large number of said ballots from the official stub, poll, and ballot book, and unlawfully, wilfully, knowingly, corruptly, and feloniously marked and voted the same for the Democrat candidate for the office of Senator of the United States and deposited said ballots in the ballot box; that said ballots were not ballots voted at said election but were forged and fictitious and the inclusion thereof in the final count of ballots returned at said election deprived the aforesaid voters of the rights and privileges guaranteed to them by the Constitution and laws of the United States as hereinbefore described; that at the time said ballots were so forged and illegally voted, they, the said defendants, forged and wrote the name of some fictitious voter on the stub book at the place where each of said ballots were removed, thereby falsely representing and pretending that said fictitious voter had appeared at said election in said precinct and voted said ballot; that the said fraudulent and fictitious ballots were thereupon placed in the ballot box, together with the false and fraudulent report and returns of said election and delivered by said defendants to the County Court Clerk's office, at Harlan, Harlan County,
Kentucky, to be delivered to the County Board of Elec-
7. tion Commissioners; that said false and fraudulent return of said ballots, stubs and ballot book was so returned for the purpose of promoting and causing to be made a dishonest, incorrect, and unfair count, return, and certification of the result of the election in said precinct, which said count impaired, lessened, diminished, diluted, and destroyed the integrity and effectiveness of the ballots and choice of said voters as expressed by their ballots.

3. The said defendants on said date, to wit: the 3rd day of November 1942, by reason of the wrongful and fraudulent acts aforesaid, unlawfully, wilfully, knowingly, falsely, and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return, and certify that the Demo-

cratic candidate for said office of United States Senator had received more votes than had been cast for said candidate.

Contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America.

JOHN T. METCALF,
United States Attorney.

18–51.

8 No. 11209. United States District Court, Eastern District of Kentucky. The United States of America vs. Clarence Poer, Sidney Solomen Pope, Odell James Shepherd, Verlin Fee. Indictment. T. 18 Sec. 51 USCA. Unlawfully conspiring to injure citizens in their right secured to them by the Constitution and laws of the U. S., to vote and have an honest count of their votes at an election for Senator of the U. S. 1 ct. A true bill, R. H. Barker, Foreman. Filed Nov. 22, 1943. A. B. Rouse, Clerk, U. S. District Court. Ruby K. Middleton, Sidney Held, W. M. Jones, H. M. Pennington, M. F. Engle, FBI Handwriting Expert.

9 In United States District Court

Demurrer

Filed Dec. 11, 1943

The defendants, Clarence Poer, Sidney Solomon Pope, and Verlin Fee, and each of them, without waiving their motion to quash filed herein, but specifically relying thereon, and reserving all objections to the jurisdiction of the Court over the persons of the defendants and the subject matter of this action, demur to the indictment, and each count thereof, filed herein, upon the following grounds:

1. That neither the said indictment, nor any count thereof, states facts sufficient to constitute a crime against the United States.

2. That said indictment is duplicitous, in the more that one separate and distinct offense is charged in the various counts in the indictment.

3. That none of the paragraphs of the indictment states facts sufficient to constitute a criminal offense against the United States and do not state any violation of the laws of the United States, and that said indictment, and each count thereof, contains mere conclusions and does not plead facts, and that said allegations are irrelevant, immaterial, extraneous, prejudicial, and argumentative.

4. That said indictment fails to describe and to particularize the alleged combination and conspiracy to violate laws of the United States and particularly the terms and provisions of Title 18, Section 51, U. S. C. A. (Section 19 of the Criminal Code), or the alleged attempt or the alleged combination and conspiracy with sufficient definiteness and certainty and so specifically as to enable these defendants to prepare and make their defense thereto, and to plead an acquittal or conviction thereunder in bar of any other proceeding against them based on the same matters or things, or any of them, on which the indictment is based.

5. That said indictment fails to describe and to particularize the alleged combination and conspiracy, or the means allegedly agreed upon to accomplish the purpose thereof, with sufficient definiteness and certainty, and so specifically as to charge an offense against the United States, so as to enable this Court, from an inspection of the indictment, to ascertain whether, if carried into effect, the alleged means would constitute a violation of the laws of the United States and particularly Title 18, Section 51, U. S. C. A. (Section 19 of the Criminal Code).

Wherefore, the above-named defendants pray for an order sustaining the above demurrer to the indictment filed herein, and for all other proper relief incident thereto.

GOLDEN and LAY,
HARRY B. MILLER,
Attorneys for Defendants.

Copy of above demurrer delivered to Hon. J. T. Metcalf, United States Attorney, this December 14, 1943.

HARRY B. MILLER,
Attorney for Defendants.

11 In United States District Court

Order sustaining demurrer

Filed December 20, 1943

This cause coming on to be heard upon the defendants' demurrer to the indictment herein, briefs having been considered and the Court having heard oral arguments thereon, is of the opinion that Section 51 of Title 18, United States Code Annotated (Section 19, Criminal Code) upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants herein, and it is therefore ordered that the demurrer

be, and it is hereby, sustained to which ruling the plaintiff, United States of America, objects and excepts.

H. CHURCH FORD, *Judge.*

12 In United States District Court

Memorandum opinion

Filed Jan. 6, 1944

On December 20, 1943, an order was entered sustaining a demurrer to the indictment herein.

The purpose of this memorandum is to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code, 18 U. S. C. A. § 51, the statute upon which the indictment is founded.

The general allegations of the indictment are, in substance, that an election was held in Pansy precinct No. 53–A, Harlan County, Kentucky, on the 3rd day of November 1942, for the purpose of electing a United States Senator at which many legally qualified citizens and residents of that precinct cast their votes; that defendants who were the election officers, unlawfully conspired with each other, and with other persons whose names are to the grand jury unknown to injure and oppress divers citizens, qualified voters of the precinct, in the free exercise and enjoyment of rights and privileges guaranteed and secured to them by the Constitution and laws of the United States. These general allegations are followed by a specific description of the particular acts charged to constitute the alleged crime as follows:

"* * * the said defendants then and there * * * did unlawfully, wilfully, knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a

13 large number of blank and unvoted ballots and to then and there mark, forge, and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely, and fairly cast, counted, and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged, and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified, and constitute a part of the total

vote as recorded and returned by them as officers of the election in said precinct at said election so as thereby to diminish, impair, dilute, and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate, and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct."

The overt acts alleged are that at the time and place of the Congressional election described in the indictment, the defendants, as officers of the election, conducted it in the exercise of their respective official duties; that they illegally and corruptly
14 removed a large number of ballots from the official ballot book and forged and voted them for the Democratic candidate for the office of Senator of the United States and deposited them in the ballot box which they delivered to the County Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to and counted by the County Board of Election Commissioners, and that they, "by reason of the wrongful, fraudulent acts aforesaid, unlawfully, wilfully, knowingly, falsely, and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate."

The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

That the right of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights "secured by the Constitution" within the meaning of and protected by section 19 of the Criminal Code, is not open to question, Ex parte Yarbrough, 110 U. S. 651, United States v. Mosely, 238 U. S. 383. Where a primary election is an integral part of the procedure for cho'sing a representative in Congress, the same rights of
15 voters are protected by the same statute (United States v. Classic 313 U. S. 299).

But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

In United States v. Bathgate, 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions

of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy "to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation" and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty or integrity of Congressional elections, but "the right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudicable one common to all that the public shall be protected against harmful acts, * * *."

The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as "ballot-box stuffing." According to the established policy of Congress,
16 as interpreted by the Supreme Court in the Bathgate case, the protection of the public from such type of election crimes is left to State laws (United States v. Gradwell, 253 U. S. 476; Chavez v. United States, 261 F. 174 (8 Cir.); United States v. Kantor, 78 F. (2d) 710 (2 Cir.); Steedle v. United States, 85 F. (2d) 867 (3 Cir)).

H. CHURCH FORD, *Judge.*

17 In United States District Court

Order allowing appeal

Filed January 18, 1944

This cause having come on this day before the Court on petition of the United States of America, plaintiff herein, praying an appeal to the Supreme Court of the United States for reversal of the judgment and order in the cause sustaining the demurrer of the defendants to the indictment therein, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court of the United States, and the Court having heard and considered said petition, together with plaintiff's statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in said cause, the same having been duly filed with the Clerk of this Court, it is, therefore, by the

Court ordered and adjudged, that the plaintiff herein, the United States of America, be, and it is hereby, allowed an appeal from the order and judgment of this Court sustaining the demurrer of the defendants to the indictment, to the Supreme Court of the United States, and that a duly certified copy of the record in said cause be transmitted to the Clerk of the Supreme Court.

It is further ordered, that the United States of America be, and it is hereby, permitted a period of forty days in which to file and docket the said appeal in the Supreme Court of the United States.

Dated at Lexington, Kentucky, this 18th day of January 1944.

By the Court:

H. CHURCH FORD,
United States District Judge,
Eastern District of Kentucky.

18 In United States District Court

Petition for appeal

Filed January 18, 1944

Comes now the United States of America, plaintiff herein, and states that on the 20th day of December 1943, the United States District Court for the Eastern District of Kentucky entered a judgment and order sustaining a demurrer to the indictment herein, and that the United States of America, feeling aggrieved at the ruling of the District Court in sustaining said demurrer, prays that it may be allowed an appeal to the Supreme Court of the United States for a reversal of said judgment and order, and that a transcript of the record in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

Petitioner submits and presents to the court herewith a statement showing the basis of the jurisdiction of the Supreme Court to entertain an appeal in this cause.

UNITED STATES OF AMERICA,
JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

19–32 In United States District Court

Assignment of errors

Filed January 18, 1944

Comes now the United States of America, by John T. Metcalf, United States Attorney for the Eastern District of Kentucky,

and avers that in the record proceedings and judgment and order herein there is manifest error and against the just rights of the said plaintiff in this, to wit:

1. That the court erred in sustaining the demurrer to the indictment.

2. That the court erred in holding that there is "no federal statute which covers the reprehensible election fraud commonly referred to as 'ballot box stuffing.'"

3. That the court erred in holding that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is [not] a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code (18 U. S. C. 51) of the United States."

4. That the Court erred in holding "that section 51 of Title 18, United States Code Annotated (section 19, Criminal Code), upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses [of knowingly and wilfully conspiring to cause a false count of the votes cast at an election for the purpose of electing a United States Senator, by placing in the ballot boxes false and fictitious ballots] charged to have been committed by the defendants herein."

JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

33-34 In United States District Court

Order filing notice of appeal, etc.

Filed January 19, 1944

Came John T. Metcalf, United States Attorney for the Eastern District of Kentucky, and tendered and offered for filing Notice of Appeal, Citation, and praecipe for Transcript of Record, service of each of which is shown on the face thereof to have been accepted by Harry B. Miller, counsel for the Appellees, and the Court being advised,

It is ordered that the same be now filed and noted of record herein, and the Clerk will include this order in the record on appeal.

H. CHURCH FORD, *Judge.*

35 (Citation in usual form showing service on Clarence Poer et al. omitted in printing.)

36 In United States District Court.

Praecipe

Filed January 19, 1944

To the CLERK, *United States District Court for the Eastern District of Kentucky:*

The appellant, the United States of America, hereby directs that in preparing the transcript of the record in this cause in the United States District Court for the Eastern District of Kentucky, you include the following:

1. Docket entries and minute entries showing return of the indictment, filing of demurrer thereto, entry of order sustaining demurrer, and filing of memorandum opinion of Judge Ford in reference to order sustaining demurrer.
2. Indictment.
3. Demurrer.
4. Order sustaining demurrer.
5. Memorandum opinion of Judge Ford in reference to order sustaining demurrer.
6. Petition for appeal to the Supreme Court.
7. Statement as to the jurisdiction of the Supreme Court.
8. Assignment of errors.
9. Order allowing appeal.
10. Notice of service on appellees of petition for appeal, order allowing appeal, assignment of errors, and statement as to jurisdiction.

37 11. Citation.
12. Praecipe.

JOHN T. METCALF,
United States Attorney,
Eastern District of Kentucky.

Service of the foregoing Praecipe for Transcript of Record is acknowledged this 19th day of January 1944.

HARRY B. MILLER,
Counsel for Appellees.

38 (Clerk's certificate to foregoing transcript omitted in printing.)

39 In the Supreme Court of the United States

October Term, 1943

No. 717

Statement of points to be relied on and designation of record

Filed March 8, 1944

Pursuant to Rule XIII, paragraph 9 of this Court, appellant states that it intends to rely upon all of the points in its assignments of error.

Appellant deems the entire record, as filed in the above-entitled cause, necessary for the consideration of the points relied upon.

CHARLES FAHY, *Solicitor General.*

40 Supreme Court of the United States

No. 717, October Term, 1943

THE UNITED STATES OF AMERICA, APPELLANT

vs.

CLARENCE POER ET AL.

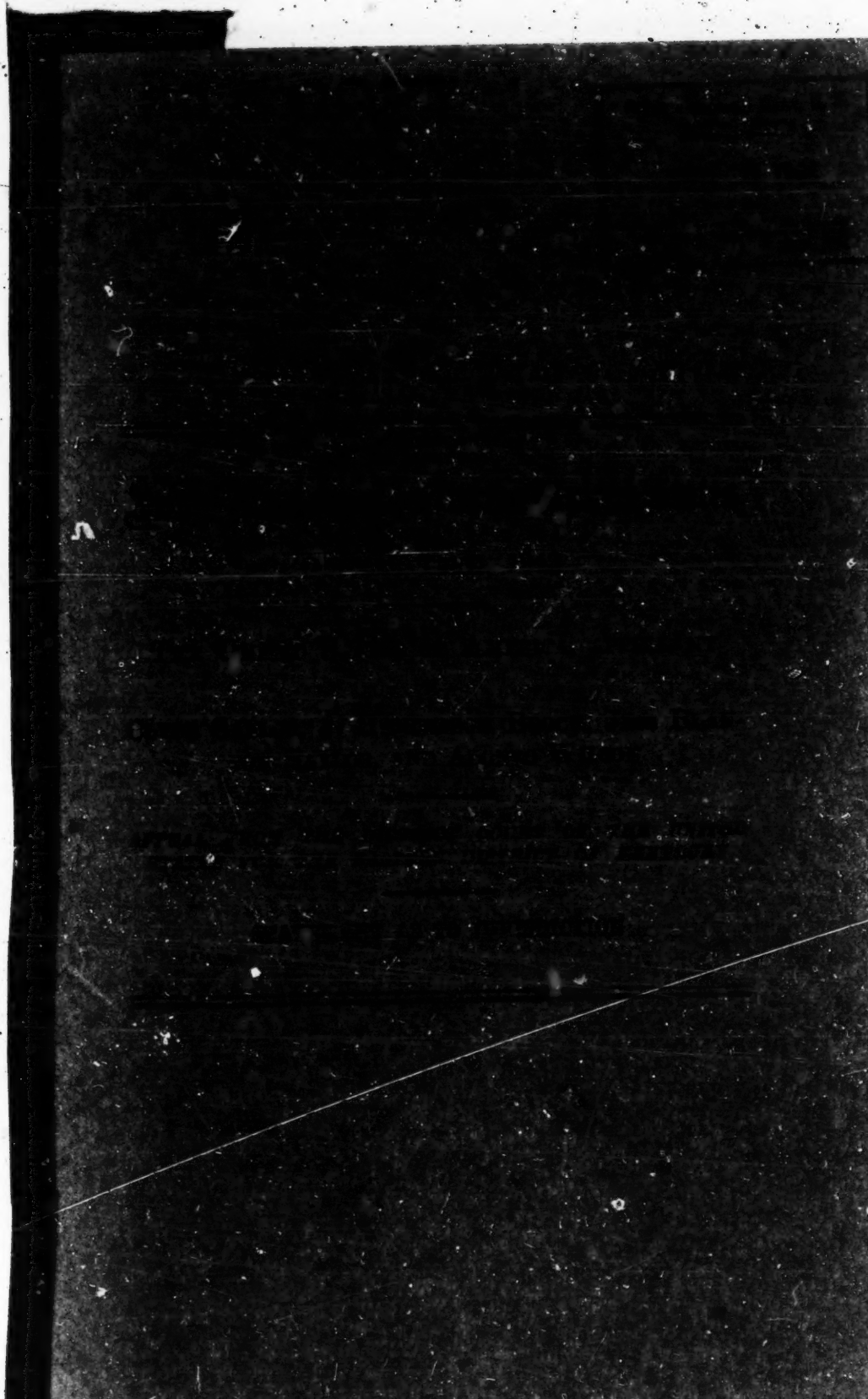
Order noting probable jurisdiction

March 6, 1944

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted, and the case is consolidated with No. 716 for hearing.

[Endorsement on cover:] File No. 48210. D. C. U. S., Eastern Kentucky. Term No. 717. The United States of America, Appellant vs. Clarence Poer, Sidney Solomon Pope, Odell James Shepherd and Verlin Fee. Filed February 18, 1944. Term No. 717 O. T. 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1944



STATEMENT AS TO JURISDICTION

(Filed Jan. 18, 1944)

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on December 20, 1943, sustaining a demurrer to the indictment therein. Petition for appeal was filed on January 18, 1944, and is presented to the District Court herewith, to wit, on January 18, 1944.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 19 of the Criminal Code, 18 U. S. C. 51, provides in pertinent part as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any

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> citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same * * * they shall be fined not more than $5,000 and imprisonment not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

THE ISSUE AND THE RULING BELOW

The defendants, Clyde Saylor, J. Henderson Brock, Jess Blanton Saylor, and Alonzo Wilson, were indicted at the November 1943 Term of the United States District Court for the Eastern District of Kentucky at London, Kentucky, for conspiracy to deprive qualified voters, at an election held on November 3, 1943, for the purpose of electing a United States Senator, of their right to have their ballots "freely and fairly cast, counted and certified and accorded and given full value and effect," in violation of section 19 of the Criminal Code (18 U. S. C. 51). The indictment alleged that the defendants, Clyde Saylor and J. Henderson Brock, acted as the duly appointed and qualified judge of said election in Molus precinct No. 2, Harlan County, Kentucky, and that the defendants, Jess Blanton Saylor and Alonzo Wilson, acted as the duly appointed clerk and sheriff, respectively, of said election in said precinct.

After setting forth that many persons, who were citizens and residents of the United States and of Harlan County, Kentucky, were entitled by the laws of Kentucky and the Constitution of the United States to vote at said election, in said precinct, for a duly qualified candidate for United States Senator, and that such persons did vote for a duly qualified person who was the Republican candidate for United States Senator, the indictment charged that the defendants "did unlawfully, wilfully, knowingly and feloniously conspire" to deprive such persons of the free exercise and enjoyment of the rights and privileges secured to them by the Constitution of the United States, in that the defendants did agree to, and did, remove a large number of ballots from the official stub, poll and ballot book, and mark and vote the same for the Democratic candidate for United States Senator, and make a false and fraudulent return of said ballots, stubs, and ballot book to the County Clerk's Office to be delivered to the County Board of Election Commissions, with the effect of causing the Board of Election Commissioners "to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate." This, the indictment charged, "impaired, lessened, diminished, diluted and destroyed the integrity and effectiveness of the ballots and

choice of said voters [who had voted for the Republican candidate]."

The defendants demurred to the indictment on the ground, *inter alia*, that it does not state facts sufficient to constitute a crime against the United States.

In sustaining the demurrer the District Court held that Section 19 of the Criminal Code "as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants." In a supplemental memorandum, the purpose of which was "to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code," the District Court ruled that there is "no federal statute which covers the reprehensible election fraud commonly referred to as 'ballot box stuffing;'" and that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is [not] a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States." The District Court regarded the case of *United States* v. *Bathgate*, 246 U. S. 220, as controlling.

Since the District Court thus ruled that the facts alleged in the indictment do not fall within the preview of section 19, and moreover, expressly acknowledged that this ruling "was based solely" upon a construction of the statute, the ruling is subject to review by the Supreme Court on direct appeal. *United States* v. *Lepowitch*, 318 U. S. 702, 703–704; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patton*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195.

THE QUESTION IS SUBSTANTIAL

We believe that the District Court erred in holding that section 19 of the Criminal Code affords no protection to citizens from having the value of their lawfully cast votes at Congressional elections lessened by acts of election officials in stuffing ballot boxes with fictitious and forged ballots. Such a construction of the statute is inconsistent with the sweep of its language, and is not required by the decisions of the Supreme Court thereunder.

The right to vote for Members of Congress, as provided by state or supervening federal laws, is a right guaranteed by the Constitution (Art. 1, § 2; 17th Amend.) and is therefore a right in which citizens are secured by section 19 of the Criminal

Code.[1] *United States* v. *Classic*, 313 U. S. 299, 314; *Ex parte Yarborough*, 110 U. S. 651. In *United States* v. *Mosley*, 238 U. S. 383, the Court held that a qualified voter has not only the right to cast his vote, but also the right to have his vote counted, and that therefore section 19 covers a conspiracy to omit duly cast votes from the count. The majority of the Court was of the opinion that the repeal in 1894 (28 Stat. 36), of the sections of the Enforcement Act of 1870 (16 Stat. 140) punishing specific acts of interference with the elective franchise, did not have the effect of depriving citizens of the general protection afforded by section 19 of the Criminal Code.[2]

On the other hand, in *United States* v. *Bathgate*, 246 U. S. 220, the Court held that section 19 does not cover a conspiracy to bribe voters.[3] The Court distinguished between the personal right to vote which is within the protection of section 19, and the political right common to all "that the public shall be protected against harmful acts," which it held was not within the protection of section

[1] The conspiracy condemned by section 19 is one to oppress "any citizen" in the enjoyment of a right "secured to him" by the Constitution or laws of the United States.

[2] The decision in *United States* v. *Classic*, 313 U. S. 299, reaches the same result with respect to a failure to count votes cast in a primary election, where the primary is an integral part of the election machinery or is decisive of the result of the subsequent election.

[3] The Court had previously held in *United States* v. *Gradwell*, 243 U. S. 476, that section 19 does not apply to a conspiracy to deprive candidates, by means of bribery, of a right to nomination in a primary election.

19. It further stated that the express repeal in 1894, of the provisions of the Enforcement Act of 1870 punishing bribery, supported the view that bribery does not come within the purview of section 19. As previously noted, the District Court in the present case regarded the *Bathgate* case as controlling.

However, the facts of the present case come much closer to the Mosley than to the *Bathgate* situation. The indictment does not charge general injury to the common right of all citizens to honest elections, but a specific injury to the right of those citizens whose ballots cast for their candidate were lessened in value by the casting of fraudulent and fictitious ballots for the opposing candidate. Stuffing of ballot boxes may not always deprive a citizen of his vote as directly and completely as does failure to count his vote, but it has a more direct and more readily ascertainable effect on that vote than does bribery of other voters. It would be almost impossible to prove the actual effect of bribery in decreasing the value of any particular vote, since it would be necessary to determine how many voters actually changed their votes in consequence of the bribes. In the case of ballot-box stuffing, however, the mathematical effect upon the quantitative value of an individual vote is readily determinable. If one hundred qualified persons vote in a district, each vote has a weight of one one-hundredth; and if one hundred fictitious ballots are added, the value of each

vote is reduced to one two-hundredths. Where the effect is to change the outcome of the election, each voter for the losing candidate is deprived of the whole value of his vote, and all voters at the election are deprived of their right of representation by the majority's choice, as effectively as though the majority's vote had not been counted at all. In the ultimate result, it makes no difference to an individual voter whether his vote is not counted at all or is diminished in value to the point of insignificane by false and fictitious ballots. The situation in the present case seems therefore to fall within the rule of the *Mosley* case.

The question presented by this case is substantial and of large public importance, for it concerns the construction of section 19 in its application to offenses, of a recurring type, to rights secured to large numbers of citizens by the Constitution of the United States.

Appended hereto is a copy of the order of the District Court entered on December 20, 1943, and a copy of its supplemental memorandum in reference thereto, filed as a part of the record in this case on January 6, 1944.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

JOHN T. METCALF,
United States Attorney for the Eastern District of Kentucky.

[Appendage filed Jan. 18, 1944]

ORDER

(Entered and filed Dec. 20, 1943)

This cause coming on to be heard upon the defendants' demurrer to the indictment herein, briefs having been considered and the Court having heard oral arguments thereon, is of the opinion that Section 51, Title 18, United States Code Annotated (Section 19, Criminal Code), upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants herein, and it is, therefore, ordered that the demurrer be and it is hereby sustained, to which ruling the plaintiff, United States of America, objects and excepts.

H. CHURCH FORD, *Judge*.

[Appendage filed Jan. 18, 1944]

MEMORANDUM

(Filed Jan. 6, 1944)

On December 20, 1943, an order was entered sustaining a demurrer to the indictment herein.

The purpose of this memorandum is to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code, 18 U. S. C. A. § 51, the statute upon which the indictment is founded.

The general allegations of the indictment are, in substance, that an election was held in Molus precinct No. 32, Harlan County, Kentucky, on the 3rd day of November, 1942, for the purpose of electing a United States Senator at which many legally qualified citizens and residents of that precinct cast their votes; that defendants who were the election officers unlawfully conspired with each other, and with other persons whose names are to the grand jury unknown, to injure and oppress divers citizens, qualified voters of the precinct, in the free exercise and enjoyment of rights and privileges guaranteed and secured to them by the Constitution and laws of the United States. These general allegations are followed by a specific description of the particular acts charged to constitute the alleged crime as follows:

> * * * the said defendants then and there * * * did unlawfully, wilfully, knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and to then and there mark, forge and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely and fairly cast, counted and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal

> ballots of the aforesaid voters said false, forged and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election, so as thereby to diminish, impair, dilute and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct.

The overt acts alleged are that at the time and place of the Congressional election described in the indictment, the defendants, as officers of the election, conducted it in the exercise of their respective official duties; that they illegally and corruptly removed a large number of ballots from the official ballot book and forged and voted them for the Democratic candidate for the office of Senator of the United States and deposited them in the ballot box which they delivered to the County Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to and counted by the County Board of Election Commissioners, and that they, "by reason of the wrongful, fraudulent acts aforesaid, unlawful, wilfully, knowingly, falsely and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate."

The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

That the rights of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights "secured by the Constitution" within the meaning of and protected by section 19 of the Criminal Code, is not open to question, *Ex parte Yarbrough,* 110 U. S. 651, *United States* v. *Mosely,* 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute. *United States* v. *Classic,* 313 U. S. 299.

But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

In *United States* v. *Bathgate,* 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy "to leave the conduct of elections at which its members are chosen to state law alone, except

where it may have expressed a clear purpose to establish some further or definite regulation" and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty or integrity of Congressional elections, but "the right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, * * *."

The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as "ballot box stuffing." According to the established policy of Congress, as interpreted by the Supreme Court in the *Bathgate* case, the protection of the public from such type of election is left to State laws. *United States* v. *Gradwell*, 243 U. S. 476; *Chavez* v. *United States*, 261 F. 174, (8 Cir.); *United States* v. *Kantor*, 78 F. (2d) 710, (2 Cir.); *Steedle* v. *United States*, 85 F. (2d) 867, (3 Cir.).

H. CHURCH FORD, *Judge*.

JANUARY 6, 1944.

U. S. GOVERNMENT PRINTING OFFICE 1944

STATEMENT AS TO JURISDICTION, FILED JANUARY 18, 1944

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on December 20, 1943, sustaining a demurrer to the indictment therein. Petition for appeal was filed on January 18, 1944, and is presented to the District Court herewith, to wit, on January 18, 1944.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 401), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code, 28 U. S. C. 345.

STATUTE INVOLVED

Section 19 of the Criminal Code, 18 U. S. C. 51, provides in pertinent part as follows:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States,

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> or because of his having so exercised the same * * * they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

THE ISSUE AND THE RULING BELOW

The defendants, Clarence Poer, Sidney Solomon Pope, Odell James Shepherd, and Verlin Fee, were indicted at the November 1943 Term of the United States District Court for the Eastern District of Kentucky at London, Kentucky, for conspiracy to deprive qualified voters, at an election held on November 3, 1942, for the purpose of electing a United States Senator, of their right to have their ballots "freely and fairly cast, counted and certified and accorded and given full value and effect," in violation of Section 19 of the Criminal Code (18 U. S. C. 51). The indictment alleged that the defendants Clarence Poer and Sidney Solomon Pope acted as the duly appointed and qualified judges of said election in Pansy Precinct No. 53-A, Harlan County, Kentucky, and that the defendants Odell James Shepherd and Verlin Fee acted as the duly appointed clerk and sheriff, respectively, of said election in said precinct. After setting forth that many persons, who were citizens and residents of the United States and of Harlan County, Kentucky, were en-

titled by the laws of Kentucky and the Constitution of the United States to vote at said election, in said precinct, for a duly qualified candidate for United States Senator, and that such persons did vote for a duly qualified person who was the Republican candidate for United States Senator, the indictment charged that the defendants "did unlawfuly, wilfully, knowingly and feloniously conspire" to deprive such persons of the free exercise and enjoyment of the rights and privileges secured to them by the Constitution of the United States, in that the defendants did agree to, and did, remove a large number of ballots from the official stub, poll and ballot book, and mark and vote the same for the Democratic candidate for United States Senator, forge and write the name of some fictitious voter on the stub book at the place where each of such ballots had been removed, and make a false and fraudulent return of said ballots, stubs, and ballot book to the County Clerk's Office to be delivered to the County Board of Election Commissioners, with the effect of causing the Board of Election Commissioners "to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate." This, the indictment charged, "impaired, lessened, diminished, diluted and destroyed the integrity and effectiveness of the ballots and choice of said voters who had voted for the Republican candidate."

The defendants demurred to the indictment on the ground, *inter alia*, that it does not state facts sufficient to constitute a crime against the United States.

In sustaining the demurrer the District Court held that Section 19 of the Criminal Code "as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants." In a supplemental memorandum, the purpose of which was "to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of Section 19 of the Criminal Code" the District Court ruled that there is "no federal statute which covers the reprehensible election fraud commonly referred to as 'ballot box stuffing;'" and that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is not a Constitutional right to which Congress intended to afford protection by the provisions of Section 19 of the Criminal Code of the United States." The District Court regarded the case of *United States* v. *Bathgate*, 246 U. S. 220, as controlling.

Since the District Court thus ruled that the facts alleged in the indictment do not fall within the purview of Section 19, and moreover, expressly

acknowledged that this ruling "was based solely" upon a construction of the statute, the ruling is subject to review by the Supreme Court on direct appeal. *United States* v. *Lepowitch*, 318 U. S. 702, 703–704; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patton*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195.

THE QUESTION IS SUBSTANTIAL

We believe that the District Court erred in holding that section 19 of the Criminal Code affords no protection to citizens from having the value of their lawfully cast votes at Congressional elections lessened by acts of election officials in stuffing ballot boxes with fictitious and forged ballots. Such a construction of the statute is inconsistent with the sweep of its language, and is not required by the decisions of the Supreme Court thereunder.

The right to vote for members of Congress, as provided by state or supervening federal laws, is a right guaranteed by the Constitution (Art. 1 § 2; 17th Amend.) and is therefore a right in which citizens are secured by section 19 of the Criminal Code.[1] *United States* v. *Classic*, 313 U. S.

[1] The conspiracy condemned by section 19 is one to oppress "any citizen" in the enjoyment of a right "secured to him" by the Constitution or laws of the United States.

299, 314, *Ex parte Yarbrough,* 110 U. S. 651. In *United States* v. *Mosley,* 238 U. S. 383, the Court held that a qualified voter has not only the right to cast his vote, but also the right to have his vote counted, and that therefore section 19 covers a conspiracy to omit duly cast votes from the count. The majority of the Court was of the opinion that the repeal in 1894 (28 Stat. 36), of the sections of the Enforcement Act of 1870 (16 Stat. 140) punishing specific acts of interference with the elective franchise, did not have the effect of depriving citizens of the general protection afforded by section 19 of the Criminal Code.[2]

On the other hand, in *United States* v. *Bathgate* 246 U. S. 220, the Court held that section 19 does not cover a conspiracy to bribe voters.[3] The Court distinguished between the personal right to vote which is within the protection of section 19, and the political right common to all "that the public shall be protected against harmful acts," which it held was not within the protection of section 19. It further stated that the express repeal in 1894, of the provisions of the Enforce-

[2] The decision in *United States* v. *Classic,* 313 U. S. 299, reaches the same result with respect to a failure to count votes cast in a primary election, where the primary is an integral part of the election machinery or is decisive of the result of the subsequent election.

[3] The Court had previously held in *United States* v. *Gradwell,* 243 U. S. 476, that section 19 does not apply to a conspiracy to deprive candidates, by means of bribery, of a right to nomination in a primary election.

ment Act of 1870 punishing bribery, supported the view that bribery does not come within the purview of section 19. As previously noted, the District Court in the present case regarded the *Bathgate* case as controlling.

However, the facts of the present case come much closer to the *Mosley* than to the *Bathgate* situation. The indictment does not charge general injury to the common right of all citizens to honest elections, but a specific injury to the right of those citizens whose ballots cast for their candidate were lessened in value by the casting of fraudulent and fictitious ballots for the opposing candidate. Stuffing of ballot boxes may not always deprive a citizen of his vote as directly and completely as does failure to count his vote, but it has a more direct and more readily ascertainable effect on that vote than does bribery of other voters. It would be almost impossible to prove the actual effect of bribery in decreasing the value of any particular vote, since it would be necessary to determine how many voters actually changed their votes in consequence of the bribes. In the case of ballot-box stuffing, however, the mathematical effect upon the quantitative value of an individual vote is readily determinable. If one hundred qualified persons vote in a district, each vote has a weight of one one-hundredth; and if one hundred fictitious ballots are added, the value of each vote is reduced to one two-hundredths.

Where the effect is to change the outcome of the election, each voter for the losing candidate is deprived of the whole value of his vote, and all voters at the election are deprived of their right of representation by the majority's choice, as effectively as though the majority's votes had not been counted at all. In the ultimate result, it makes no difference to an individual voter whether his vote is not counted at all or is diminished in value to the point of insignificance by false and fictitious ballots. The situation in the present case seems therefore to fall within the rule of the *Mosley* case.

The question presented by this case is substantial and of large public importance, for it concerns the construction of section 19 in its application to offenses, of a recurring type, to rights secured to large numbers of citizens by the Constitution of the United States.

Appended hereto is a copy of the order of the District Court entered on December 20, 1943, and a copy of its supplemental memorandum in reference thereto, filed as a part of the record in this case on January 6, 1944.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
JOHN T. METCALF,
United States Attorney for the Eastern District of Kentucky.

APPENDAGE FILED JANUARY 18, 1944

ORDER ENTERED AND FILED DECEMBER 20, 1943

This cause coming on to be heard upon the defendants' demurrer to the indictment herein, briefs having been considered and the Court having heard oral arguments thereon, is of the opinion that Section 51 of Title 18, United States Code Annotated (Section 19, Criminal Code) upon which the indictment herein is founded, as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants herein, and it is therefore, ordered that the demurrer be, and it is hereby sustained, to which ruling the plaintiff, United States of America, objects and excepts.

H. CHURCH FORD,
Judge.

DECEMBER 20, 1943.

APPENDAGE FILED JANUARY 18, 1944

MEMORANDUM FILED JANUARY 6, 1944

On December 20, 1943, an order was entered sustaining a demurrer to the indictment herein.

The purpose of this memorandum is to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code, 18 U. S. C. A. § 51, the statute upon which the indictment is founded.

The general allegations of the indictment are, in substance, that an election was held in Pansy precinct No. 53–A, Harlan County, Kentucky, on the 3d day of November, 1942, for the purpose of electing a United States Senator at which many legally qualified citizens and residents of that precinct cast their votes; that defendants who were the election officers, unlawfully conspired with each other, and with other persons whose names are to the grand jury unknown, to injure and oppress divers citizens, qualified voters of the precinct, in the free exercise and enjoyment of rights and privileges guaranteed and secured to them by the Constitution and laws of the United States. These general allegations are followed by a specific description of the particular acts charged to constitute the alleged crime as follows:

> "* * * the said defendants then and there * * * did unlawfully, willfully,

knowingly, feloniously, corruptly, and fraudulently agree to remove and tear from the official book of ballots and stub book furnished for said election at said precinct, a large number of blank and unvoted ballots and to then and there mark, forge and vote the same for the candidate of the Democratic party for the office of Senator of the United States, opposing the candidate for whom the aforesaid voters had voted, in order to deprive the aforesaid voters of their right and privilege of having their and each of their legal votes so cast at said election fully, freely and fairly cast, counted and certified and accorded and given full value and effect; that said defendants further agreed and conspired to place in the ballot box with the legal ballots of the aforesaid voters said false, forged and fictitious ballots, with the intent and purpose that said illegal ballots be returned, counted, certified and constitute a part of the total vote as recorded and returned by them as officers of the election in said precinct at said election so as thereby to diminish, impair, dilute and destroy the effect of the choice of said voters and to wrongfully affect the result of said election in said precinct and to cause and procure a dishonest, inaccurate and fraudulent count and certification by the Harlan County Board of Election Commissioners of the votes actually cast at said precinct."

The overt acts alleged are that at the time and place of the Congressional election described in the indictment, the defendants, as officers of the election, conducted it in the exercise of their respective official duties; that they illegally and cor-

ruptly removed a large number of ballots from the official ballot book and forged and voted them for the Democratic candidate for the office of Senator of the United States and deposited them in the ballot box which they delivered to the County Clerk's Office at Harlan, Harlan County, Kentucky, to be delivered to and counted by the County Board of Election Commissioners, and that they, "by reason of the wrongful, fraudulent acts aforesaid, unlawfully, wilfully, knowingly, falsely and corruptly caused and induced the Board of Election Commissioners of Harlan County, Kentucky, to count, return and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate."

The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

That the rights of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights "secured by the Constitution" within the meaning of and protected by

section 19 of the Criminal Code, is not open to question, *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Mosley,* 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute. *United States* v. *Classic,* 313 U. S. 299.

But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

In *United States* v. *Bathgate,* 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy "to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation" and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty or integrity of Congressional elections, but "the right or privilege to be guarded, as indicated both by the language em-

ployed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, * * *."

The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as "ballot box stuffing". According to the established policy of Congress, as interpreted by the Supreme Court in the *Bathgate* case, the protection of the public from such type of election crimes is left to State laws. *United States* v. *Gradwell*, 243 U. S. 476; *Chavez* v. *United States*, 261 F. 174, (8 Cir.); *United States* v. *Kantor*, 78 F. (2d 710 (2 Cir.); *Steedle* v. *United States* 85 F. (2d) 867, (3 Cir.)

H. CHURCH FORD,
Judge.

JANUARY 6, 1944.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

Nos. 716, 717

In the Supreme Court of the United States

OCTOBER TERM, 1943

THE UNITED STATES OF AMERICA, APPELLANT

v.

CLYDE SAYLOR, J. HENDERSON BROCK, JESS BLANTON SAYLOR, AND ALONZO WILSON

THE UNITED STATES OF AMERICA, APPELLANT

v.

CLARENCE POPE, SIDNEY SOLOMON POPE, ODELL JAMES SHEPHERD, AND VERLIN FEE

APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 716

THE UNITED STATES OF AMERICA, APPELLANT

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CLYDE SAYLOR, J. HENDERSON BROCK, JESS BLANTON SAYLOR, AND ALONZO WILSON

No. 717

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APPEALS FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF KENTUCKY

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The memorandum opinions of the district court (No. 716, R. 7–10; No. 717, R. 8–10) are unreported.

JURISDICTION

The judgments of the district court sustaining demurrers to the indictments were filed on December 20, 1943 (No. 716, R. 7; No. 717, R. 7–8). The orders allowing appeals were filed on January 18, 1944 (No. 716, R. 10; No. 717, R. 10–11). Probable jurisdiction was noted by this Court on March 6, 1944, and the two cases were consolidated for hearing (R. 14).[1] The jurisdiction of this Court is conferred by the Act of March 2, 1907, 34 Stat. 1246 (as amended by the Act of May 9, 1942, 56 Stat. 271), 18 U. S. C. 682, commonly known as the Criminal Appeals Act, and by Section 238 of the Judicial Code (as amended by the Act of February 13, 1925, 43 Stat. 936), 28 U. S. C. 345.

QUESTION PRESENTED

Whether the concerted action of state election officials in "stuffing" ballot boxes, whereby duly qualified citizens voting for a candidate for election as United States Senator are deprived of the full value of their votes by virtue of the casting of false and fictitious ballots for the opposing candidate, is an impairment of the free exercise or enjoyment by such citizens of a right or privilege secured to them by the Constitution or laws of the United States, within the meaning of Section 19 of the Criminal Code (18 U. S. C. 51).

[1] The two records are for the most part identical; and a single reference denotes the same page in both records.

STATUTE AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 19 of the Criminal Code (18 U. S. C. 51) provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same, or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than $5,000 and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

Article I, Sections 2 and 4, of the Constitution provides in part:

> SECTION 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.
>
> No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not,

when elected, be an Inhabitant of that State in which he shall be chosen.

* * * * *

SECTION 4. The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.

* * * * *

The Seventeenth Amendment to the Constitution provides:

> The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.
>
> When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided,* That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.
>
> This amendment shall not be so construed as to affect the election or term of any Senator chosen before it becomes valid as part of the Constitution.

STATEMENT

The respondents in both cases were indicted (R. 1–6) at the November 1943 Term of the United States District Court for the Eastern District of Kentucky, under Section 19 of the Criminal Code (*supra*, p. 3), for conspiracy to deprive duly qualified citizens voting at an election held on November 3, 1942, for the purpose of electing a United States Senator, of their right to have their ballots "freely, and fairly cast, counted, and certified and accorded and given full value and effect" (R. 4). The respondents Clyde Saylor and Brock acted as the duly appointed and qualified election judges in Molus precinct No. 32, Harlan County, Kentucky (No. 716, R. 2), and the respondents Poer and Pope served in the same capacity in Pansy precinct No. 53–A, Harlan County, Kentucky (No. 717, R. 2); the respondents Jess Blanton Saylor and Wilson were, respectively, the clerk and sheriff of the election in Molus precinct No. 32 (No. 716, R. 2), and the respondents Shepherd and Fee served respectively in the same capacities in Pansy precinct No. 53–A (No. 717, R. 2). The indictments set forth that many persons, who were citizens and residents of the United States and of Harlan County, Kentucky, were entitled by the laws of Kentucky and the Constitution of the United States to vote at the election in these precincts, for a duly qualified candidate for United States Senator, and that such

persons did vote for the duly qualified Republican candidate (R. 1–3). The indictments then proceed to charge that the defendants respectively named therein "did unlawfully, wilfully, knowingly, and feloniously conspire" to deprive the voters for the Republican candidate of the free exercise and enjoyment of the rights and privileges secured to them by the Constitution of the United States, in that such defendants did agree to, and did, remove a large number of blank ballots from the official stub, poll and ballot book, mark and vote the same for the Democratic candidate for United States Senator, forge and write the name of some fictitious voter on the stub book at the place where each of such ballots had been removed, and make a false and fraudulent return of said ballots, stubs, and ballot book to the county clerk's office to be delivered to the County Board of Election Commissioners, with the effect of causing the Board "to count, return, and certify that the Democratic candidate for said office of United States Senator had received more votes than had been cast for said candidate" (R. 3–6). This, the indictments charged, "impaired, lessened, diminished, diluted, and destroyed the integrity and effectiveness of the ballots and choice of said voters [for the Republican candidate] as expressed by their ballots" (R. 5).

Respondents demurred to the indictments on the ground, *inter alia*, that they did not state facts

sufficient to constitute a crime against the United States (R. 6–7). In sustaining the demurrers the district court held that Section 19 of the Criminal Code "as properly interpreted and construed, does not apply to the offenses charged to have been committed by the defendants" (R. 7). In supplemental memorandum opinions, the purpose of each of which was "to make it clear that the judgment of the Court in sustaining the demurrer was based solely upon the construction of section 19 of the Criminal Code"[2] (No. 716, R. 7; No. 717, R. 8), the district court ruled that there is "no Federal statute which covers the reprehensible election fraud commonly referred to as 'ballot-box stuffing'" (R. 10); and that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is [not] a Constitutional right to which Congress intended to afford protection by

[2] Since the district court ruled that the facts alleged in the indictments do not fall within the purview of Section 19, and expressly acknowledged that the rulings were based "solely" upon a construction of the statute, they are subject to review by this Court on direct appeals. *United States* v. *Lepovitch*, 318 U. S. 702, 703–704; *United States* v. *Classic*, 313 U. S. 299, 309; *United States* v. *Kapp*, 302 U. S. 214, 217; *United States* v. *Birdsall*, 233 U. S. 223, 230; *United States* v. *Patten*, 226 U. S. 525, 535; *United States* v. *Heinze*, 218 U. S. 532, 540; *United States* v. *Stevenson*, 215 U. S. 190, 194–195.

the provisions of section 19 of the Criminal Code of the United States" (R. 9). The district court regarded the cases as controlled by this Court's decision in *United States* v. *Bathgate*, 246 U. S. 220, holding that a conspiracy to bribe voters at a general Congressional election is not within the purview of Section 19 (R. 9–10).

SPECIFICATION OF ERRORS TO BE URGED

The district court erred:

1. In holding that no federal statute has any application to "ballot-box stuffing."

2. In holding that "the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted," is not a constitutional right to which Congress intended to afford protection by Section 19 of the Criminal Code.

3. In holding that Section 19 has no application to the offense of conspiring to cause a false count of the votes cast at an election, held for the purpose of electing a United States Senator, by placing in the ballot boxes false and fictitious ballots.

4. In sustaining the demurrers to the indictments.

SUMMARY OF ARGUMENT

A. The constitutional character (under Art. I, Secs. 2, 4; 17th Amend.) of the right of a voter, qualified by state law, to cast a ballot for a congressional candidate and to have that ballot counted as cast, is well established. Subject to other constitutional provisions, the members of the class entitled to exercise the right are determined by state laws, but the right of a member of the class so defined is conferred and protected by the federal Constitution. *Ex parte Yarbrough,* 110 U. S. 651; *United States* v. *Mosley,* 238 U. S. 383; *United States* v. *Classic,* 313 U. S. 299.

The constitutional right to cast a ballot for a congressional candidate and to have that ballot counted for the candidate for whom it was cast includes a right that it be given its full value and effect in the election, unimpaired by the "stuffing" of the ballot-boxes with false and fictitious ballots for an opposing candidate. The constitutional right is concerned with substance, not with forms. The effects of casting spurious ballots, and of altering or failing to count ballots properly cast, are virtually identical. Each spurious ballot cast for one candidate nullifies a ballot validly cast for another candidate, and diminishes the proportionate weight to which every ballot properly cast is entitled. Where spurious voting in a precinct causes the returns of that precinct to be rejected, as in *Emery* v. *Hennessy*, 331 Ill. 296 (1928), and

Scholl v. *Bell*, 125 Ky. 750 (1907), the effect is to disfranchise, in the particular election, every voter in the precinct. Where spurious voting changes the outcome of an election, it denies to every voter for the loser the whole value of his ballot, and denies to everyone concerned the right of representation by the majority's choice. In all cases it denies to every qualified voter the right to participate on a free and equal basis in a free and equal election—a right which, by its incorporation in Section 6 of the Constitution of the State of Kentucky, where the facts of the present cases occurred, is clearly a part of the right to vote in accordance with valid state laws which the federal Constitution guarantees. The right of protection from spurious ballots is therefore included within the federal right to cast a ballot for a congressional candidate and to have that ballot counted as cast.

B. Section 19 of the Criminal Code, which punishes conspiracies to injure or oppress citizens in the free exercise or enjoyment of federal rights, includes within its protection from such conspiracies the right of a citizen, in accordance with applicable state laws, to cast a ballot for a congressional candidate and to have that ballot counted as cast, *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299; and by the same token it includes within its protection the right to cast a ballot without having its value

and effect destroyed or impaired by the "stuffing" of ballot-boxes with false and fictitious ballots. The effect of ballot-box "stuffing" upon the constitutional right to vote is direct and ascertainable. In this respect it is exactly similar to the alteration of ballots, as involved in the *Classic* case, and the failure to count ballots, as involved in the *Mosley* case, and differs materially from the bribery of voters that was held in *United States* v. *Bathgate*, 246 U. S. 220, to fall outside the scope of Section 19 for the reason that it was not found to impair a personal right such as the right to vote was conceded to be. The vote of a bribed voter, unlike a fictitious ballot, is his own vote which he is not barred from casting; and it is normally impossible to prove either that he voted in accordance with the bribe or that he would have voted any differently had it not been for the bribe. Such considerations are in no way applicable to ballot-box "stuffing."

Section 19 is not rendered inapplicable by reason of the fact that it may be impossible for any individual qualified voter to prove that it was his, rather than someone else's, vote that was disregarded. In the *Classic* case, as likewise in *United States* v. *Pleva*, 66 F. (2d) 529 (C. C. A. 2), and *Devoe* v. *United States*, 103 F. (2d) 584 (C. C. A. 8), certiorari denied, 308 U. S. 571, Section 19 was held applicable under circumstances that provided no greater possibility of such proof

than does the present case, since in all those cases it would have been impossible to prove *whose* ballots were the ones altered or otherwise not counted as cast. Section 19, like the rights which it protects, is concerned with substance, not with forms; and its application in the protection of a personal right does not depend on the particular method selected for violation of that right.

By its express language Section 19 protects "any" federal right or privilege, without exception. This Court in the *Classic* case has held that its language is "unambiguous," that the right protected by it is protected "regardless of the method of interference," and that it is no extension of the statute "to find a violation of it in a new method of interference with the right which its words protect" (313 U. S. at 322, 324). Moreover, its legislative history shows clearly that Congress at all times since 1870 has regarded conspiracies to violate the federal rights of citizens as of serious federal concern, calling for the enactment and retention of a statute carrying severe penalties, regardless of whether the contemplated acts, if done individually without concert of action or without the intent or effect of impairing the federal rights of citizens, would be separately punishable by federal law. Section 19 of the Enforcement Act of May 31, 1870 (c. 114; 16 Stat. 140), from Section 6 of which Section 19 of the Criminal Code has been derived, included ballot-box

"stuffing" within its coverage. But Section 19 of the original Act had no application to conspiracies as such, unaccompanied by the actual commission of the acts proscribed, and its application to the actual commission of the proscribed acts did not depend upon their having the effect of impairing the constitutional rights of citizens. This being true, the repeal by the Act of February 8, 1894 (c. 25, 28 Stat. 36) of Section 19 of the 1870 Act, as then embodied in Section 5511 of the Revised Statutes, in no way restricted the scope of Section 6 of the original Act, as then embodied in Section 5508 of the Revised Statutes, which the repealing Act of 1894 left standing, to be later reenacted as Section 19 of the Criminal Code. Ten years before the adoption of the repealing Act this Court, in *Ex parte Yarbrough*, 110 U. S. 651, 663–664, had expressed the same view of the nature of the federal right of suffrage and of the fact of its protection by Section 5508 of the Revised Statutes (Cr. Code § 19) that it later developed more fully in the *Classic* case. Congress thus was not unaware, in 1894, that its failure to repeal Section 5508 of the Revised Statutes left punishable by federal law conspiracies to violate federal rights by acts which, if done by individuals not acting in concert, were no longer so punishable, by virtue of the repeal of other provisions which had applied to them without regard to their effect upon federal rights otherwise con-

ferred. The legislative history, of both the original 1870 Act and the repealing Act of 1894, thus confirms the plain meaning of the unambiguous language of Section 19 of the Criminal Code. And, since ballot-box "stuffing" is a method of interference with the constitutional right to vote, not distinguishable in substance from the methods of interference held in the *Mosley, Classic, Pleva,* and *Devoe* cases to violate Section 19, it follows that Section 19 is applicable here.

ARGUMENT

THE DECISION BELOW, REMOVING FROM THE PROTECTION OF SECTION 19 RIGHTS SECURED BY THE CONSTITUTION OF THE UNITED STATES, IS WITHOUT ADEQUATE BASIS IN EITHER THE LANGUAGE OF THE STATUTE OR ITS LEGISLATIVE HISTORY. THE ACTS CHARGED IN THE INDICTMENTS ARE COVERED BY THE STATUTE.

A. *The right of a duly qualified voter to cast a ballot for a candidate for election to Congress, without impairment by the "stuffing" of the ballot-box with false and fictitious ballots for an opposing candidate, is a right secured by the Constitution of the United States.*[3]—It can hardly now be

[3] The district court's opinions are not necessarily inconsistent with this proposition, which is, however, an essential premise of our argument. In our view the opinions of the district court hold that the right in question is not a constitutional right protected by Section 19 of the Criminal Code, rather than that it is not a constitutional right. Our position, as developed *infra*, at pages 23 *et seq.* is that, as a constitutional right, it is within the protection of Section 19.

disputed that the right of suffrage in the election of members of Congress,* in accordance with the applicable state or federal laws, is a right secured by the Constitution of the United States (Art. I, Secs. 2, 4; 17th Amend.) and includes not merely the right to cast a ballot but likewise the right to have that ballot counted. *Ex parte Yarbrough*, 110 U. S. 651; *United States* v. *Mosley*, 238 U. S. 383; *United States* v. *Classic*, 313 U. S. 299. As the majority opinion in the *Classic* case points out (313 U. S. at 314–315), "The right of the people to choose, whatever its appropriate constitutional limitations, where in other respects it is defined, and the mode of its exercise is prescribed by state action in conformity to the Constitution, is a right established and guaranteed by the Constitution and hence is one secured by it to those citizens and inhabitants of the state entitled to exercise the right. * * * Obviously included within the right to choose, secured by the Constitution, is the right of qualified voters within a state to cast their ballots and have them counted at Congressional elections. * * * And since the constitutional command is without restriction or limitation, the right, unlike those guaranteed by the Fourteenth and Fifteenth Amendments, is secured against the action of

* We use the single phrase "members of Congress" to designate both Senators and Representatives, and the single phrase "congressional elections" to designate elections at which either a Senator or Representative or both are chosen.

individuals as well as of states." The dissenting opinions in the *Mosley* and *Classic* cases do not in the least respect deny the constitutional basis of the right of suffrage in congressional elections, nor that this constitutional right includes the right to have a ballot counted as well as cast.

The constitutional right to cast a ballot for a congressional candidate and to have it counted for that candidate includes, we submit, the right that it be given its full weight in the election, unimpaired by the casting of false and fictitious ballots for an opposing candidate. Equality in the exercise of suffrage is a basic element of the right of suffrage. Section 6 of the Constitution of Kentucky, expressly provides that "all elections shall be free and equal"—a guarantee which, indeed, by virtue of the Fourteenth and Fifteenth Amendments state laws would be powerless to abridge. The right to vote in accordance with the laws of Kentucky, which the Constitution of the United States guarantees to Kentucky voters in Congressional elections, thus is a right to vote in a free and equal election, on a free and equal basis.[5] In

[5] In the *Classic* case (No. 618, October 1940 Term, Brief for the United States, pp. 36–40, 43–47), the argument was made by the Government that the acts of the respondents in altering ballots, since they were done in connection with the performance of respondents' functions as state election officials, constituted state action in violation of rights secured by the Fourteenth Amendment and on that basis should be regarded as bringing the case within Section 19 of the Criminal Code (as well as within Section 20, 18 U. S. C. 52) as

applying a similar state constitutional provision to the very same fraud known as ballot-box "stuffing" that is here involved, the Supreme Court of Illinois, in *Emery* v. *Hennessy*, 331 Ill. 296, 301–302 (1928), has aptly said: "When the ballot-box becomes the receptacle of fraudulent votes the freedom and equality of elections are destroyed. That election is free and equal where all of the qualified electors in the precinct are carefully distinguished from the unqualified and are protected in the right to deposit their ballots in safety and unprejudiced by fraud. That election is not free and equal where the true electors are not separated from the false, where the ballot is not deposited in safety or where it is supplanted by fraud."

The constitutional right is concerned with realities, not with forms. In their effects upon a legally qualified voter's constitutional right to cast a free and equal vote in a free and equal election, there can be no real difference of substance between fraud in the form of failure to count ballots properly cast, and fraud in the form of "stuffing" the ballot-boxes with false and fictitious ballots not entitled to be cast. Where there are only two candidates, and a majority of all the

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applied to respondents individually. That argument, while equally pertinent here, is unnecessary, since as indicated in the text there is here, as distinguished from the *Classic* case, no serious question of the inclusion in the Constitution (Art. I, §§ 2 and 4; Amend. 17) of the right charged to have been invaded, or of federal power to protect that right.

votes cast elects, the failure to count votes for one candidate will necessarily have no different or greater effect than the counting of an equal number of spurious votes for the other.[6] Where there are more than two candidates, and an ordinary plurality of all the votes cast elects, the effects of failure to count votes and of counting spurious votes may differ, depending upon the positions in the voting of the respective candidates who received votes omitted from the count or for whom spurious votes were cast; and indeed, the casting of spurious votes may have a more direct and greater effect, and provide a more workable method of influencing an election, than the failure to count an equal number of votes properly cast.[7]

[6] Thus, suppose that 200,000 votes are properly cast in an election with A and B as the opposing candidates. If each receives 100,000, the failure to count one vote for A, or the counting of one spurious vote for B, will have the effect of breaking the tie. If, of the 200,000 votes properly cast, A receives 100,001 and B 99,999, either the failure to count two of A's votes, or the counting of two spurious votes for B, will have the effect of turning the election won by A into a tie; and either the failure to count three of A's votes, or the counting of three spurious votes for B, will have the effect of making B the winner. So long as A and B are the only candidates, and a majority of the votes cast elects, the effects of the two types of fraud are identical.

[7] Thus, suppose that there are five candidates for a single office, that a simple plurality elects, and that of 200,000 votes properly cast A receives 70,000, B receives 60,000, C, 40,000, D, 20,000, and E, 10,000. As between A and B the situation is the same as that discussed in footnote 6 *supra;* that is, the number of votes that would have to be subtracted from A's total, in order to create a tie with or swing the election

This may also be true where a designated percentage of all the votes cast, or of the total number of registered voters, is required to elect.* In

to B, will be the same as the number of spurious votes which, if added to B's total without the subtraction of any votes from A's, would produce the same result. Of course, the addition of 10,001 spurious votes for C, D, or E, either individually or collectively, would not have the same result, of swinging the election to B, that the failure to count 10,001 of A's votes would have. However, the number of spurious votes required to elect either C, D, or E, while necessarily larger than the number of votes which, if subtracted from A's total, would result in the election of B, will not be as large as the total number of properly cast votes that would have to be omitted from the count in order to result in the election of C, D, or E. For example, in the case supposed, to be elected by the "spurious vote" method C would require 30,001 spurious votes; D would require 50,001; and E would require 60,001. By the "failure to count" method, however, C's election would require the subtraction of 30,001 of A's votes and 20,001 of B's, or a total of 50,002; D's election would require the subtraction of 50,001 of A's votes, 40,001 of B's, and 20,001 of C's, or a total of 110,003; and E's election would require the subtraction of 60,001 of A's votes, 50,001 of B's, 30,001 of C's, and 10,001 of D's, or a total of 150,004.

It seems obvious that, especially where the votes properly cast are more evenly distributed among the several candidates than in the case supposed, the "spurious vote" method is a more workable and perhaps less detectable form of influencing the outcome of an election than the "failure to count" method. It requires a less exact gauging of the relative strength of all the opposing candidates.

*Thus, suppose that forty percent of the total number of votes cast is required to elect, and that of 200,000 votes properly cast A receives 75,000 and B receives 70,000. Here the addition of 8,333 spurious votes to A's total, or of 16,666 to B's, will make the recipient the winner, and render a run-off election unnecessary. But to enable A's 75,000 votes to constitute 40 percent of the total number of votes properly cast

every case each spurious vote cast for one candidate, whether it changes the outcome of the election or not, exactly offsets a vote properly cast for another candidate, and reduces the proportionate weight in the election of every vote properly cast. The effect in these respects is ascertainable with mathematical exactness.[9] Wherever spurious votes are cast for one candidate, an equal number of voters for another candidate are deprived of the whole value of their votes, and every voter in the election is deprived of a portion of the weight of his own vote. Where the effect is to change the outcome of the election, every voter for the losing candidate is deprived of the whole value of his vote, and all voters at the election are deprived of their right of representation by the majority's choice, as effectively as though the majority's vote had not been counted at all.[10] In the ultimate result, it makes no differ-

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would require the omission from the count of at least 12,500 of the votes cast for other candidates; whereas to enable B's 70,000 votes to carry the election would require the omission from the count of at least 25,000 votes cast for other candidates, including at least 5,001 cast for A.

[9] Thus, if 100 qualified persons vote in a precinct, each vote has a weight of one one-hundredth; and if 100 fictitious ballots are added, the value of each vote is reduced to one two-hundredths. Every spurious vote for one candidate exactly offsets a vote properly cast for his closest competitor among the votes properly cast.

[10] The fact that the fictitious ballots, if ascertainable, may be declared invalid and not counted, does not show that no right has been violated, or that no injury has been done, but merely that the possibility of a specific remedy exists. How-

ence whether a vote properly cast is not counted, or is deprived of all value or diminished in value by the casting of a spurious vote to counteract it.

There is thus no tenable ground of distinction between the method of election fraud employed in the *Mosley* case and that involved here. In the *Mosley* case the second count of the indictment charged the making of a false return by omitting therefrom the returns of certain precincts. (238 U. S. at 385). Here the indictments charged (R. 4–5) the making of a false return by the inclusion therein of spurious votes from certain precincts. The effect on the properly cast vote of the duly qualified voter was the same, and the impairment

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ever, where ballot-box "stuffing" is shown to have been done on a large scale in a given voting precinct, and it is impossible to ascertain the exact number of fictitious ballots cast, the result is that the entire returns from the precinct may properly be omitted from the count. *Emery* v. *Hennessy*, 331 Ill. 296, 301–302 (1928): "There is a distinction, in the nature of things, between particular illegal votes which may be proven and exactly computed, and the effect of fraudulently stuffing the ballot box by the election officials. * * * Where the election officials in a precinct participate in fraud to such an extent that it is impossible to determine the number of legal votes cast therein or for whom they were cast, the court will throw out and disregard that precinct and adjudge the election to the candidate receiving the highest number of legal votes cast in the other precincts in the territory in which the election was held. * * * Under the evidence in this case the county court was fully justified in rejecting the entire vote of the fifth precinct." See also *Scholl* v. *Bell*, 125 Ky. 750, 776 (1907). In such cases the effect of ballot-box "stuffing" is the disfranchisement of every single voter in the precinct in which it has occurred.

of his constitutional right was as great. And the *Classic* case likewise presents no relevant factual difference. There the indictment charged the making of a false return as a result of altering ballots so that they were marked and counted for a candidate other than those for whom they had been cast (313 U. S. at 308). The method thus used merely combines the methods of the *Mosley* case and of this case—i. e., by the single step of altering one ballot the defendants withdrew one properly cast vote from Candidate B (as in the *Mosley* case) and added one spurious vote to the count of Candidate A (as in this case). The combination of the two methods in one process simply increased the speed at which the election fraud progressed. To achieve the same result by the "spurious vote" method alone it would be necessary to cast two spurious ballots, rather than altering one. Nothing in either the majority or the minority opinion in the *Classic* case suggests that the constitutional protection against impairment of the right to vote depends upon such a quantitative detail.

On the basis of the *Mosley* and *Classic* decisions we submit, therefore, that the constitutional right to cast a ballot for a congressional candidate and to have it counted for that candidate includes a right to have the full value and effect of that ballot protected against impairment by the casting of false and fictitious ballots for an opposing candi-

date; and that the Constitution amply authorizes the statutory protection of such right.

B. *The constitutional right of a duly qualified voter to cast a ballot for a candidate for election to Congress, without impairment by the "stuffing" of the ballot-box with false and fictitious ballots for an opposing candidate, is a right which Section 19 of the Criminal Code safeguards to any such voter who is a citizen.*[11]—The *Mosley* and *Classic* decisions not only establish that the right of suffrage in the election of members of Congress, in accordance with the applicable state or federal laws, is a right secured by the Constitution (Art. 1, Secs. 2, 4; 17th Amend.) and includes the right to have one's ballot counted as cast; they also hold that a conspiracy to oppress a citizen in the exercise or enjoyment of that right, by omitting his ballot from the count or by counting it for a candidate other than the one for whom it was cast, is a violation of Section 19 of the Criminal Code. In Part A (*supra*, pp. 14–23) we have compared the effect of ballot-box "stuffing" with the effect of failure to count ballots properly cast, as in the *Mosley* case, and with the effect of altering

[11] The constitutional right is not necessarily limited to citizens, if the voting qualifications contained in applicable state or federal laws are not so limited. However, the conspiracy condemned by Section 19 is one to oppress "any citizen" in the enjoyment or exercise of rights conferred by the Constitution or laws of the United States. *Baldwin* v. *Franks*, 120 U. S. 678, 691–692; *Powe* v. *United States*, 109 F. (2d) 147, 149 (C. C. A. 5), certiorari denied, 309 U. S. 679.

ballots properly cast, as in the *Classic* case; and we have shown that the constitutional right to have a ballot counted as cast must necessarily include the right that it be given its full force and effect, unimpaired by the casting of false and fictitious ballots for an opposing candidate.

If our analysis is correct, it follows that the *Mosley* and *Classic* cases are equally clear authority for the conclusion that the constitutional right of suffrage is protected by Section 19 against infringement by the particular device employed in this case. This conclusion could be avoided only if, notwithstanding the essential similarity of ballot-box "stuffing" to the fraudulent methods employed in those cases, some controlling reason is to be found either in the language of Section 19, or in its legislative history, for excluding that particular form of election fraud from its protection. We submit that no such reason exists.

(1) *The Language of Section 19.*—

Section 19 by its express terms covers any conspiracy of two or more persons to injure or oppress any citizen in the free exercise or enjoyment of "any" right or privilege secured to him by the Constitution or laws of the United States. The language thus on its face admits of no exception or exemption. This Court in the *Classic* case found it to be "unambiguous" (313 U. S. at 322), and the dissenting opinion in that case did not, as we understand it, undertake to cast doubt on

the propriety of the Court's views as to the scope of the protection of constitutional rights afforded by Section 19 to voters at final elections, as distinguished from primaries.[12] From the language of the section itself, therefore, "it is apparent that the Congress in enacting this law intended it for the protection of the free enjoyment of *any* right or privilege under the Constitution or laws of the United States." *United States* v. *Ellis*, 43 F. Supp. 321, 323 (W. D. S. C.).

Accordingly, we submit that the language of Section 19 leaves no room for the conclusion of the court below that its scope is not sufficiently broad to protect the citizens' right to vote at congressional elections against impairment by a conspiracy to stuff the ballot box. In so holding, the court below relied mainly on the decision of this Court in *United States* v. *Bathgate*, 246 U. S. 220, to the effect that the section does not cover a conspiracy to bribe voters at a congressional election. We believe that the court below misunderstood the decision in the *Bathgate* case, and incorrectly

[12] While stating that the *Mosley* decision "went to the verge when it held that § 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election" (313 U. S. at 334), the *Classic* dissent, as we view it, does not contend that the *Mosley* decision should be overruled, or deny either the constitutional basis of the right involved or the fact of an infringement of such right; its disagreement with the majority seems to be limited to the issue of construing Section 19 to extend to voters at primary elections the protection of constitutional rights which it concededly afforded to voters at final elections.

applied it to the facts of the case at bar. The essential differences become apparent upon analysis.

In the *Bathgate* case the contention of the Government, as summarized by the Court (246 U. S. at 226), was "that lawful voters at an election for presidential electors, senator and members of Congress and also the candidates for those places have secured to them by Constitution or laws of the United States the right and privilege that it shall be fairly and honestly conducted", and that Section 19 protects this right against "conspiracy to influence voters by bribery". Without discussing the nature of the right asserted, the Court said (246 U. S. at 226–227): "The right or privilege to be guarded [by Section 19], as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, non-judicable one common to all that the public shall be protected against harmful acts, which is here relied on." But though thus holding that the individual has no right, protected by Section 19, to engage in elections untinged by bribery, the Court in the very next sentence reiterated with approval the doctrine of the *Mosley* case applying the section to infringement of the individual right to vote: "The right to vote is personal and we have held it is shielded by the section in question. *Ex parte Yarbrough*, 110 U. S. 651; *United States v. Mosley, supra.* * * *" (246 U. S. at 227).

The *Bathgate* case thus has, as we read it, no tendency to restrict the scope accorded by the *Mosley* case to Section 19. As we have shown, under the latter case the individual voter is protected in his right to cast his vote and to have it counted as cast. Without in any way impairing the validity of our contention that that doctrine applies as much here as it did to the facts before the Court in the *Mosley* case, we may accept—and for the purposes of this case we do accept—the conclusion of the *Bathgate* case that the individual voter has no "definite, personal" right to have congressional elections conducted without interference by bribery or other forms of corruption.[12] Consideration of the nature and consequences of bribery—as contrasted with the actual falsification of returns—shows an obvious rational basis for distinction between the two situations.

Bribery, of course, corrupts the integrity of elections. It is damaging to the public interest and, generally, criminal. It may improperly influence or even control the result of elections, and we be-

[12] The result might well be otherwise if the acceptance of a bribe by a voter constituted an absolute disqualification of the voter from voting, since then his ballot would stand in the same case as a forged or fictitious ballot, and if cast and counted would *pro tanto* defeat the personal right of qualified voters to have their own votes given full weight. But no attempt was made to show in the *Bathgate* case that such a situation obtained under the relevant state law, and the case therefore does not exclude the possibility that if such a showing where made Section 19 might be held applicable.

lieve there is no question of the power of the Federal Government to punish its use in elections to federal office.[14] But vicious as bribery is, there are certain clear differences between its effect on the individual, personal right of the honest voter which is protected by Section 19, and the effect which the practices adopted in the *Mosley* case, the *Classic* case, and this case have on that same right. These differences, we believe, are sufficient to explain the decision in the *Bathgate* case without in any way weakening the conclusion that the personal right to vote is protected by Section 19 against interference in the form of ballot-box "stuffing."

In the first place, a voter who has accepted a bribe is not necessarily by that fact excluded from the right to vote. His vote, even though it may have been illegally secured, is still his own vote, which is the absence of a disqualifying statute he is constitutionally entitled to cast.[15] It is true that as a general rule his vote is to be excluded from the count of the candidate guilty of the

[14] As pointed out in the opinion in the *Bathgate* case (246 U. S. at 226), bribery in congressional elections was at one time covered by another section of the Enforcement Act of May 31, 1870, in which the present Section 19 of the Criminal Code originated. See pp. 46-47, *infra*.

[15] See footnote 13, *supra*, p. 27. In Kentucky, for instance, although acceptance of a bribe is by statute made a crime and a disqualification from suffrage (Kentucky Revised Statutes (1942), § 124.190), the disqualification is apparently effective only upon criminal conviction. See *Lovely v. Cockrell*, 237 Ky. 547, 550 (1931).

bribery,[16] but it has been held that an election carried by the inclusion of votes proved to have been procured by bribery will nevertheless not be invalidated in the absence of proof that the bribe was given, approved, acquiesced in, or ratified by the candidate for whom the vote was cast.[17] Under these decisions a bribed vote is one which, at least under some circumstances, may legally be cast and counted, notwithstanding the illegality of the bribery itself, and to that extent it may be difficult to sustain any claim that the personal right of the honest citizen to vote, as distinguished from the general public interest in free and fair elections, has been illegally impaired by the act of bribery.

Furthermore, as a practical matter the precise effect of bribery on the personal right of the unbribed voter may be more difficult to demonstrate than here. The bribed voter still retains his freedom of choice, and has all the benefit of the secrecy of the ballot booth, so that it may be virtually impossible to prove that he fulfilled his bargain,[18] or that he would have voted any differently if it had not been for the bribe.

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[16] *Noble* v. *Bowman*, 249 Ky. 343, 346 (1933); *Adkins* v. *Phipps*, 159 Ky. 349, 353 (1914); *Cowan* v. *Prowse*, 93 Ky. 156, 168–169 (1892).

[17] *Van der Zee* v. *Means*, 225 Ia. 871, 879–880, 281 N. W. 460, 463, 465 (1938); *Scalf* v. *Pursifull*, 250 Ky. 447, 449–450 (1933).

[18] In fact, one of the arguments for the secret ballot is that "it checks bribery through the uncertainty that the bribed

Bribery, consequently, though no less deleterious to the public interest than ballot-box "stuffing," differs both legally and practically from the latter in its impact on the *personal* rights of citizens which this Court held in the *Bathgate* case to be the only rights protected by Section 19. The effect of the latter, as we have shown (*supra*, pp. 17–22), is mathematically demonstrable; the reality and extent of its interference with the individual rights of others to vote are susceptible of positive and definite proof. It constitutes, in a sense in which it may be conceded that bribery (at least in the absence of a disqualifying statute) does not, a

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party will vote as he promised." *Jones* v. *Glidewell*, 53 Ark. 161, 170 (1890). A person who is not disqualified from suffrage is protected by the secrecy of the ballot booth, which goes so far as to prohibit even his willing testimony as to how he voted. *Jones* v. *Glidewell*, *supra*, at p. 172; *Major* v. *Barker*, 99 Ky. 305, 310 (1896); *Little* v. *Alexander*, 258 Ky. 419, 422 (1934). On the other hand, this absolute privilege does not apply in favor of one who votes without being legally qualified for suffrage, although in such a case the privilege against self-incrimination is ordinarily applicable. *Hogg* v. *Caudill*, 254 Ky. 409, 412 (1934); *Black* v. *Spillman*, 185 Ky. 201, 207 (1919); *Scholl* v. *Bell*, 125 Ky. 750, 756 (1907); *Tunks* v. *Vincent*, 106 Ky. 829, 836–837 (1899). As we have shown (*supra*, footnote 15), a bribed voter is not as such disqualified from suffrage; and we have found no case holding that he is not entitled to the privilege based on the secrecy of the ballot booth. Cf. *Noble* v. *Bowman*, 249 Ky. 343, 346 (1933), where the court, in allowing proof of how bribed voters voted, emphasized that the voting was *viva voce*. The burden of proving how illegal votes were cast is on the one contesting the election. *Duff* v. *Crawford*, 124 Ky. 73, 77–78 (1906).

method of direct impairment of a personal right. The right to vote, as even the decision in the *Bathgate* case recognized (246 U. S. at 227), is personal in character, and protected by Section 19; and that the right not only to vote but to have one's vote counted without offset by illegal ballots is also personal in character is illustrated by cases such as *Leser* v. *Garnett*, 258 U. S. 130. See *Coleman* v. *Miller*, 307 U. S. 433.[19]

Nor is Section 19 rendered inapplicable by the fact that the particular means by which the fraud was accomplished, and the right to vote impaired, was not such as to make it possible for any individual voter to establish that it was his, as distinguished from someone else's, vote that was vitiated. While that might have been possible for the voters defrauded in the *Mosley* case (where all votes from certain precincts were omitted from the count), it would have been as impossible in the *Classic* case as here.[20] The same is true of the devices used in two other cases in which Sec-

[19] The personal character of the right is further illustrated by the decisions holding that its denial is a basis for personal damage actions. *Nixon* v. *Condon*, 286 U. S. 73; *Nixon* v. *Herndon*, 273 U. S. 536, 540; *Swafford* v. *Templeton*, 185 U. S. 487, 491, 492; *Wiley* v. *Sinkler*, 179 U. S. 58, 62–64; *Smith* v. *Allwright*, Oct. Term, 1943, No. 31, decided April 3, 1944.

[20] Although the *Classic* case involved the alteration of specific valid ballots cast by individual qualified voters, lack of distinguishing marks on the ballots, as required by the election laws, would have made it impossible to prove *whose* ballots had been altered. Furthermore, it has been held that

tion 19 has been applied by lower courts. In *United States* v. *Pleva*, 66 F. (2d) 529 (C. C. A. 2), election inspectors called incorrect tallies off the backs of voting machines, arbitrarily increasing the vote for some candidates and lowering it for others, without any demonstrated relation between the amounts of the increases and decreases. In *Devoe* v. *United States*, 103 F. (2d) 584 (C. C. A. 8), certiorari denied, 308 U. S. 571, the inspectors returned arbitrarily prearranged totals for the various candidates, without reference to the actual number of ballots cast (which had, in any event, been padded by the addition of "ghosts and sleepers"—fictitious ballots in the names of nonexistent, dead, or absent persons). In the latter case the court said (at 587–588): "In so far as the joint action of the defendants was designed to and did deprive the voters of that precinct of their right to an honest count and to an honest certification of the ballots cast for Congressional candidates, it was a violation of Section 19 of the Criminal Code."

That ballot-box "stuffing" may vary slightly in technique from alteration of or failure to count votes properly cast does not render it any less subject to the statute than those methods of accomplishing the same interference with the right to vote. In the words of the *Classic* decision, it "is

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a voter cannot testify how he voted, even for the purpose of proving that his ballot has been altered. *Major* v. *Barker*, 99 Ky. 305, 310 (1896); and see fn. 18, *supra*, p. 29.

no extension of the criminal statute * * * to find a violation of it in a new method of interference with the right which its words protect. For it is the constitutional right, regardless of the method of interference, which is the subject of the statute and which in precise terms it protects from injury and oppression" (313 U. S. at 324). We submit, therefore, that nothing in the language of Section 19 justifies narrowing its scope so as to exclude from its operation a conspiracy to interfere with the right to vote at congressional elections merely because the conspirators adopted ballot-box "stuffing" instead of some other and no more effective means to effectuate the ends of the conspiracy.

(2) *The Legislative History of Section 19.*—Section 19 of the Criminal Code is derived from Section 6 of the Enforcement Act of May 31, 1870 (c. 114, 16 Stat. 140). In holding that Section 19 does not cover conspiracy to bribe voters at a Congressional election, this Court in its opinion in the *Bathgate* case emphasized (246 U. S. at 226) that bribery had been expressly denounced by another section of the original Act (Sec. 19; R. S. § 5511), and it drew the inference from the repeal of that section by the Act of February 8, 1894 (c. 25, 28 Stat. 36) that Congress intended as well to withdraw from federal concern conspiracies to corrupt federal elections by means of bribery.

While as noted above (p. 27) we do not for the purposes of this case challenge the correctness

of the decision in the *Bathgate* case, we do not accept this particular phase of the Court's reasoning therein. Bribery in federal elections was, as there noted, covered by Section 19 of the original act; but so were the forms of election fraud employed in the *Mosley* case, the *Classic* case, and this case.[21] And, as pointed out in the dissenting opinion in the *Classic* case (313 U. S. at 334), the offenses charged in the *Mosley* and *Classic* cases were likewise covered by another section of the original Act (Sec. 4; R. S. § 5506) which also was repealed in 1894.[22] These acts of repeal cannot

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[21] Section 19 of the Enforcement Act of May 31, 1870, made it a crime if any person should at a congressional election, among other things: "personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious [the device used here (R. 3–5)]; * * * or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, *or otherwise unlawfully* prevent any qualified voter * * * from freely exercising the right of suffrage [emphasis supplied; this was the effect attributed by this Court to the devices used in the *Mosley* and *Classic* cases] * * *; or by any * * * unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same [the purpose and effect of the conspiracy involved in all three cases].

[22] Section 4, which before its repeal had been declared unconstitutional by this Court in *United States* v. *Reese*, 92 U. S. 214, because not limited to federal elections, made it unlawful for any person "by force, bribery, threats, intimidation, or other unlawful means, [to] hinder, delay, prevent, or obstruct, or [to] combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen * * * from voting at any election. * * *"

therefore be regarded as narrowing the scope of Section 19 of the Criminal Code without impugning fundamentally the correctness of the decisions in the *Mosley* and *Classic* cases, which even the dissent in the *Classic* case did not in this respect undertake to do.[23] Moreover, we believe that analysis of the legislative history of Section 19 of the Criminal Code shows that the implication drawn in the *Bathgate* case as to congressional intention is insupportable.

A more realistic appreciation of the scope and purpose of Section 19 of the Criminal Code is shown in this Court's opinion in the *Mosley* case. There, Mr. Justice Holmes pointed out (238 U. S. at 387–388) that Section 4 of the original Act (*supra*, footnote 22, page 34) "dealt *only with elections*, and although it dealt with them generally and might be held to cover elections of Federal officers, it extended to *all* elections"; that, on the other hand, Section 6 (Section 19 of the Criminal Code) found its source "in the doings of the Ku Klux and the like" and that in this section Congress therefore naturally "put forth all its powers" and dealt "with all Federal rights, and protected them in the lump" from conspiracies against them; that Section 6 "being devoted * * * to the protection of all Federal rights from conspiracies

[23] See footnote 12, *supra*, p. 25; the *Classic* dissent concerned itself with the propriety of construing Section 19 to apply to primaries for the selection of candidates for federal office, as distinguished from final federal elections.

against them, naturally did not confine itself to conspiracies contemplating violence, although under the influence of the conditions then existing it put that class in the front"; that when Congress later transposed Section 6 of the original Act into Section 5508 of the Revised Statutes (now Section 19 of the Criminal Code, without subsequent change) it relegated acts of violence to a subordinate position, and thereby gave the general words of the section "a congressional interpretation"; and that, just as the Fourteenth Amendment "was adopted with a view to the protection of the colored race but has been found to be equally important in its application to the rights of all," so likewise Section 6 "had a general scope and used general words that have become the most important now that the Ku Klux have passed away." [All emphasis supplied.]

And just as the original emphasis of Section 6 upon crimes of violence did not mean that the section in its later reenactments was to be regarded as confined to such crimes, so the later repeal of many sections of the Enforcement Act and cognate legislation dealing with specific offenses against elections did not serve to limit the scope of Section 6 (now Section 19 of the Criminal Code) as a weapon against conspiracies to violate *any* federal rights of citizens. The legislative history shows, we believe, that Congress in 1870 and at all times since has regarded *conspiracies*

to violate the federal rights of citizens, by whatever means, as of serious federal concern, calling for the enactment and retention of a statute imposing severe penalties, regardless of whether the contemplated acts would be separately punishable under some other provision of federal law if done individually without concerted action, or on some other basis than their direct effect upon the federal rights of citizens. And, more specifically, we believe that Congress, when in 1894 it repealed most of the provisions of the original Enforcement Act and other legislation governing elections and at the same time preserved R. S. 5508 (Section 6 of the original Act) without amendment, intended to retain that section as a weapon against conspiracies to violate federal rights by means of ballot-box "stuffing" just as much as against conspiracies to violate such rights by the similar means involved in the *Mosley* and *Classic* cases. A detailed review of the legislative history will make this plain.

The Enforcement Act of May 31, 1870, was entitled "An Act to enforce the Right of Citizens of the United States to vote in the several states of this Union, and for other Purposes." The bill that originally passed the House was primarily a measure to provide for the federal enforcement of the right of colored citizens of the United States to vote in all elections.[24] The bill that was

[24] Cong. Globe, 41st Cong., 2d Sess., 3503–3504 (1870).

finally enacted, together with the subsequent Acts of July 14, 1870 (c. 254, §§ 5, 6, 16 Stat. 254), February 28, 1871 (c. 99, 16 Stat. 433), May 3, 1872 (c. 139, 17 Stat. 61), and June 10, 1872 (c. 415, 17 Stat. 347, 348), provided comprehensively for the federal enforcement of the right of United States citizens to vote in all elections and for the federal regulation and supervision of all elections in which a member of Congress was to be chosen.[25]

It is clear that the Act of May 31, 1870, as finally passed, was something more than a measure to enforce the Fifteenth Amendment. The bill, in the form in which it originally passed the

[25] For the convenience of the Court we are setting forth in Appendices A–D the full text of the relevant portions of these statutes, with footnote indications as to the ultimate disposition of each section, whether by repeal, amendment, or retention in existing law.

During the debate in the Senate on the bill which became the Enforcement Act of May 31, 1870, Senator Sherman of Ohio introduced an amendment designed to punish voting and registration frauds in congressional elections—expressly acknowledging that it was unrelated to racial discrimination (Cong. Globe, 41st Cong., 2d Sess. 3663–3664 (1870)). At the instance of Senator Hamlin of Maine a section of the Sherman amendment making it criminal to interfere with meetings to discuss candidates for Congress was deleted (*Ibid.*, 3673); and the amendment was then adopted (*Ibid.*, 3678). The Sherman amendment became Sections 19 and 20 of the Act as adopted, three more sections (Sections 21, 22, and 23) being added in conference (*Ibid.*, 3752–3753, 3809, 3884). In the bill as finally enacted only Sections 1, 2, 5, 17, and 23 contained reference to discriminations based upon race, color, or previous condition of servitude.

In a rider to the Naturalization Act of July 14, 1870 (c. 254, §§ 5, 6, 16 Stat. 254), Congress provided for the appointment

House,[26] did not include the provisions that have since become Sections 19 and 20 of the Criminal Code. The amendment that included what became Section 6 of the original Act and is now Section 19 of the Criminal Code was introduced in the Senate by Senator Pool of North Carolina;[27]

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of supervisors and deputy marshals whose duty it would be to police congressional elections in cities of over 20,000 inhabitants. This was the first effort of Congress to provide a body of federal officials charged with actively superintending congressional elections. The Act of February 28, 1871 (c. 99, 16 Stat. 433) repealed Sections 5 and 6 of the Act of July 14, 1870, amended Section 20 of the Act of May 31, 1870, provided that all votes for representatives in Congress should thereafter be by written or printed ballot, and established an elaborate scheme for the appointment of federal supervisors and deputy marshals as overseers at the polls in congressional elections, with provisions for the punishment of a wide variety of election offenses on the part of officials and private individuals. The bill provoked considerable controversy. While Ku Klux and similar activities were among the evils at which it was aimed (Cong. Globe, 41st Cong., 3d Sess., 1275–1276 (1871)), the emphasis was on corrupt political machines, particularly in New York City (*Ibid.*, 1280). The constitutional debate centered on the scope of Article I, Section 4 (*Ibid.*, 1272, 1277–1278, 1280, 1283–1284, 1632–1637).

The Act of June 10, 1872 (c. 415, 17 Stat. 347, 348) provided funds for expenses which might be incurred under the Act of February 28, 1871, and, together with the Act of May 3, 1872 (c. 139, 17 Stat. 61), amended the Act of February 28, 1871, in several unimportant respects.

[26] See Cong. Globe, 41st Cong., 2d Sess. 3503–3504 (1870).

[27] *Ibid.*, 3612. Senator Pool's amendment also contained the provisions which became Sections 5 and 7 of the Act as finally adopted. In offering his amendment Senator Pool stated (*Ibid.*, 3611–3612): "There is no legislation that could reach a State to prevent its passing a law. It can only reach

and the amendment that included what became Section 17 of the original Act and is now Section 20 of the Criminal Code was introduced in the Senate by Senator Stewart of Nevada, for the express purpose of protecting Chinese aliens in California from interference with their freedom

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the individual citizens of the State in the enforcement of law. You have, therefore, in any appropriate legislation, to act on the citizen, not on the State. If you pass an act by which you make it an indictable offense for an officer to execute any law of a State by which he trespasses upon any of these rights of the citizen it operates upon him as a citizen, and not as an officer. *Why can you not just as well extend it to any other citizen of the country?* * * * But, sir, individuals may prevent the exercise of the right of suffrage; individuals may prevent the enjoyment of other rights which are conferred upon the citizen by the Fourteenth Amendment, as well as trespass upon the right conferred by the Fifteenth. Not only citizens, but organizations of citizens, conspiracies, may be and are, as we are told, in some of the States formed for that purpose. I see in the fourth section of the Senate bill a provision for cases where citizens by threats, intimidation, bribery, or otherwise prevent, delay, or hinder the exercise of this right; *but there is nothing here that strikes at organizations of individuals, at conspiracies for that purpose. I believe that any bill will be defective which does not make it a highly penal offense for men to conspire together, to organize themselves into bodies, for the express purpose of contravening the right conferred by the Fifteenth Amendment.* * * * It seems not to have struck those who drew either of the two bills *that the prevention of the exercise of the right of suffrage was not the only or the main trouble that we have upon our hands.* Suppose there shall be an organization of individuals, or, if you please, a single individual, who shall take it upon himself to compel his fellow-citizens to vote in a particular way. Suppose he threatens to discharge them from employ-

of employment.[28] The words "and for other purposes" in the title of the bill were added at the suggestion of Senator Stewart to indicate the inclusion of his amendment.[29] An opponent of the bill asserted,[30] and Senator Stewart conceded,[31] that the latter's amendment rested upon the Fourteenth Amendment and the Burlingame treaty with China.

There is no doubt, therefore, that the Senate was conscious of the broad scope of the bill as finally passed. And Section 6 of the original Act (the precursor of Section 19 of the Criminal

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ment, to bring upon them the outrages which are being perpetrated by the Ku Klux organizations, so as not to prevent their voting, but to compel them to vote in accordance with the dictates of the party who brings this coercion upon them. It seems to me it is necessary that we should legislate against that. That is a more threatening view of the subject than the mere preventing of registration or of entering men's names upon the assessment books for taxation or of depositing the ballot in the box. * * *" [Emphasis supplied.]

[28] Senator Stewart stated (*Ibid.*, 3658): "Why should we not put in this bill a measure to enforce both the Fourteenth and Fifteenth Amendments at once? * * * The Fourteenth Amendment * * * says that no State shall deny to any person the equal protection of the laws. Your treaty says that they [the Chinese] shall have the equal protection of the laws. * * * We had better let the Fifteenth Amendment stand just as it does, and let it enforce itself, than attempt legislation which * * * *we know will not meet the contingencies that will arise.*" [Emphasis supplied.] Senator Stewart's amendment was adopted as Sections 16 and 17 of the Act (*Ibid.*, 3690).

[29] *Ibid.*, 3690.

[30] *Ibid.* 3672.

[31] *Ibid.*, 3658, 3690; and see footnote 28, above.

Code) was much broader, in the scope of the rights covered by its language, than Section 17 (the precursor of Section 20 of the Criminal Code).[32] The broad purpose of Section 6 was to guarantee *all* constitutional rights *to citizens,* and to impose more severe penalties upon *conspiracies* directed at them than upon their violation by *individual conduct* as specifically proscribed by other sections. This is apparent from the interrelation of

[32] Section 6 of the original act read: "*And be it further enacted*, That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court,—the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years,—and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States." The words "any right or privilege granted or secured to him by the Constitution or laws of the United States," have remained in Section 5508 of the Revised Statutes and Section 19 of the Criminal Code, unchanged except for the deletion of the words "granted or." On the other hand, Section 17 of the original Act, both by its own terms and by its reference to "any right secured or protected by the last preceding section of this act," gave protection only against discrimination based on race, color, or alienage. But when Congress adopted the Revised Statutes, it substituted in Section 5510 thereof the broader

Section 6 with other sections of the original act.[28] Section 5, for example, made it a misdemeanor, punishable by fine of not less than $500 (no maximum limit was prescribed) or imprisonment of not less than a month or more than a year, for anyone to "prevent, hinder, control, or intimidate" any person, by bribery or threats, in the exercise of the right of suffrage guaranteed to him by the Fifteenth Amendment. In view of the proximity of Section 6 to Section 5 and their common source in Senator Pool's amendment (see *supra*, p. 39, footnote 27), it can hardly be doubted that, had Congress intended the application of the former to be confined to the protection of the right of suffrage guaranteed by the Fifteenth Amendment, it would have said so, and, conversely, that had Congress intended Section 6 to have no application to conspiracies to commit the kind of invasion of the right of suffrage guaranteed by the Fifteenth Amendment which it had already proscribed to individuals by Section 5, it likewise would have said so. Instead, Section 6 expressly protected "any right or privilege" granted or secured by the Constitution or laws of the United States. The clear inference is

words "any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States" that now appear in Section 20 of the Criminal Code.

[28] That this was also Senator Pool's purpose in introducing the amendment that included Section 6 seems equally clear (see footnote 27, *supra*, p. 39).

that Congress regarded *concert of action*, even when directed to the same ends as individual action covered by Section 5, as of a more serious character calling for more severe penalties, and that it also regarded concert of action intended to deprive citizens of *any* federal rights as of such a serious character as to require the severe penalties of Section 6 regardless of whether the particular right invaded was protected by Section 5 against individual infringement.[34] Such overlapping as occurred was clearly regarded as immaterial, and in its context supports, rather than negatives, the view that Section 6 is to be given the full significance that its words import, without detraction by reason of either the enactment or the subsequent repeal of other more limited sections of the Act.

A similar interrelationship may be drawn between Section 6 and other sections of the original Act which it may appear to overlap. Section 4 applied to individual conduct (and also incidentally to conspiracies)[35] designed to "hinder,

[34] This is the obvious import of the language of Senator Pool (quoted in footnote 27, *supra*, p. 39) in sponsoring the amendment that became Sections 5, 6 and 7 of the Act.

[35] See Mr. Justice Holmes's statement in the *Mosley* case (238 U. S. at 387) that Section 4 "referred to conspiracies only as incident to its main purpose of punishing any obstruction to voting at any election in any State." Senator Pool emphasized, as a reason for sponsoring the amendment that included Section 6, that Section 4 did not *adequately* punish conspiracies directed against federal rights (see footnote 27, *supra*, p. 39).

delay, prevent, or obstruct * * * any citizen * * * from voting at any election." It was not restricted to elections at which Congressmen were chosen, as Mr. Justice Holmes pointed out in the *Mosley* case; and therefore it did not protect only federal rights as such.[36] Its relatively mild penalties, as contrasted with those of Section 6, again demonstrate that Congress regarded *concert of action,* directed to the deprivation of *federal* rights as such, to be of a more serious character, and justifying more severe punishment, than action of a type not depending for its criminality upon either its tendency to impair federal rights or the presence of a conspiracy to violate such rights. Similarly, Section 19 of the original Act, the repeal of which was relied on in the *Bathgate* case (*supra,* p. 33), was applicable only to elections at which Congressmen were chosen, but in relation to such elections covered all sorts of election frauds, regardless of whether they were of such a character as to impair the right of citizens to vote;[37] and it had no applica-

[36] Because of this lack of limitation it was held unconstitutional by this Court in *United States* v. *Reese*, 92 U. S. 214.

[37] For example, Section 19 made it a crime for anyone to "interfere in any manner with any officer of said elections in the discharge of his duties." There could well be many forms of interference with an election officer in the performance of his duties which would not constitute a violation or impairment of any citizen's right to vote. Section 19 also made it a crime for anyone "by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully [to] prevent any qualified voter of any State

tion to conspiracies as such, unaccompanied by the actual or attempted commission of the specifically proscribed acts. Again it is clear that Congress intended, by the sweeping language of Section 6, to make concert of action to deprive citizens of federal rights a more serious offense than the various types of individual actions covered by other sections of the Act, which might incidentally or on occasion directly impair federal rights but which were not dependent for their criminality upon their so doing.

Furthermore, although it is thus clear that the inclusion of ballot-box "stuffing" in the original Section 19 was not designed to exclude that method from the coverage of Section 6 when employed as a part of a conspiracy to deprive citizens of federal rights, we submit that the very

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• • • or • • • Territory • • • from freely exercising the right of suffrage, or by any such means [to] induce any voter to refuse to exercise such right." The crime thus was made out, even if the voter subjected to such pressure was an alien qualified by the applicable state laws to vote; and it may well be doubted if influencing an alien to refrain from voting would under any circumstances constitute an impairment of a citizen's right to vote. In short, Section 19 was a measure directed at virtually all election frauds in Congressional elections; the effect of a particular fraud upon the constitutional right of qualified citizens to vote was merely incidental, and not a prerequisite of the section's application; it was a purely regulatory measure, designed to safeguard the general interest in purity of elections at which Congressmen were chosen; and it was not a measure directed to the protection of the rights of citizens as such, as was Section 6.

fact of its inclusion in Section 19 indicates that Congress had it in mind as one of the methods by which a conspiracy to defeat the federal rights of citizens might be effected, and that the later repeal of Section 19 (discussed *infra*, pp. 49–52), though it eliminated ballot-box "stuffing" as such from the catalogue of federal crimes, had no effect upon the broad prohibition of Section 6 against conspiracies to impair the federal rights of citizens by the use of that or other means of causing such impairment."

The foregoing discussion has treated of Section 6 in its original form, as enacted as part of the Enforcement Act of May 31, 1870. There seems no doubt of the broad scope of the section, even in that form, to cover all conspiracies to defeat the

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"In this connection it is clear that a statute may punish conspiracies to do acts which in themselves, if performed singly, are not criminal. Thus, it is well settled that to constitute an offense by conspiracy to defraud the United States under Section 37 of the Criminal Code (18 U. S. C. 88) "it is not necessary that the conspiracy should have been to commit an act in violation of a criminal statute." *United States* v. *Terranova*, 7 F. Supp. 989, 990 (N. D. Cal.); *United States* v. *Soeder*, 10 F. Supp. 944, 946 (W. D. Mo.), *United States* v. *Stone*, 135 Fed. 392, 397–398 (D. N. J.); *United States* v. *Gordon*, 22 Fed. 250, 251 (D. Minn.); cf. *Haas* v. *Henkel*, 216 U. S. 462, 479–480; *Curley* v. *United States*, 130 Fed. 1, 8 (C. C. A. 1), certiorari denied, 195 U. S. 628. By the same token there is no reason why the repeal of a criminal statute penalizing specific individual acts should be regarded as contracting the scope of a statute punishing conspiracies to commit such acts, particularly when the conspiracy statute was part of the same original group of statutes and was deliberately left unrepealed.

federal rights of citizens, regardless of the means used or contemplated in such conspiracies. But even if the original form of the section were to suggest some limitation upon its scope—which Mr. Justice Holmes said in the *Mosley* case (238 U. S. at 388) the Court was "far from intimating"—the congressional revision of the section adopted as Section 5508 of the Revised Statutes (and later, without further change, as Section 19 of the Criminal Code) would serve to remove all doubt. By that revision the language connoting violence was, as Mr. Justice Holmes also said (238 U. S. at 388), "dropped into a subordinate place, and even there has a somewhat anomalous sound. The section now begins with sweeping general words. Those words always were in the act, and the present form gives them a congressional interpretation." By the revision the fact of conspiracy to "injure, oppress, threaten, or intimidate" was made the main thing, whatever the means proposed to accomplish the conspiracy. The temper of Congress, in the revision, to expand rather than contract the scope of the Act is illustrated by its treatment at the same time of Section 17 of the original Act. This section, which became Section 5510 of the Revised Statutes and later the present Section 20 of the Criminal Code, had in its original form given protection only against discriminations, "under color of any law," based upon race, color, or alienage.[39]

[39] See footnote 32, *supra*, p. 42.

By the revision it was materially enlarged to protect all persons from wilful violation in any form, "under color of any law," of "any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"—the same all—inclusive catalogue of federal rights which in the case of citizens had been protected, by Section 6 from the beginning, against violation in the form of conspiracies.[40] The revision thus plainly showed an intention on the part of Congress to provide the broadest possible protection to federal rights against invasions "under color of any law." Retention, in the parallel section denouncing conspiracies, of the same broad language which had existed from the beginning may properly be taken as indicative of congressional consciousness of the sweeping scope of the rights protected by Section 6 of the original Act, and

[40] We do not mean to suggest that the coverage of federal rights, by Sections 19 and 20, respectively, of the Criminal Code, is identical. The protection of Section 19 is restricted to citizens; that of Section 20 is not. As regards the methods of violation Section 19 is restricted to conspiracies; Section 20 does not apply to conspiracies as such, unaccompanied by the actual commission of the acts proscribed. To be in violation of Section 20 an act must be done "under color of any law"; under Section 19 it need not be. But that the two sections overlap is apparent from the *Classic* decision; and since the penalties of Section 19 exceed those of Section 20 the fact that the two sections have been held to overlap is of itself inconsistent with the argument that Congress could not have intended, by enacting and retaining Section 6 of the original act, to punish with severer penalties conspiracies to do acts which, if done individually, were punishable under separate provisions, now repealed, of the same act.

therefore by its modern counterpart, Section 19 of the Criminal Code.

Finally, the repeal in 1894 of a large part of the Enforcement Act of May 31, 1870, and its cognate legislation affords no justification for the view that by that action Congress intended to narrow the scope of the sections (now Sections 19 and 20 of the Criminal Code) which had become Sections 5508 and 5510 of the Revised Statutes and which were left unrepealed. The Act of February 8, 1894 (c. 25, 28 Stat. 36) was entitled "An Act to repeal all statutes *relating to supervisors of elections and special deputy marshals,* and for other purposes." [Emphasis supplied.] [41] In repealing Sections 3 and 4 of the Act of May 31, 1870 (R. S. §§ 2007–2009, 5506), it merely repealed provisions relating to *all* elections which by reason of that lack of limitation had already been held unconstitutional by this Court

[41] This Act repealed the following sections of the Revised Statutes: 2002, 2005–2031, 5506, 5511–5515, and 5520–5523. Section 2002 had been based on the Act of February 25, 1865 (c. 52, § 1, 13 Stat. 437), and concerned interference with elections by the Army and Navy. Sections 2005–2008 had been based on Sections 1–3 of the Enforcement Act of May 31, 1870. Section 2009 had been based on Section 4 of the 1870 Act and the supplemental Act of June 10, 1872 (c. 415, § 1, 17 Stat. 349). Section 2010 had been based on Section 23 of the 1870 Act. Sections 2011–2031 had all been based on the Acts of February 28, 1871 (c. 99, 16 Stat. 433), and June 10, 1872. Section 5506 had been been based on Section 4 of the 1870 Act; Sections 5511–5515 had been based on Sections 19–21 of the 1870 Act and Section 1 of the Act of February 28, 1871; Sections 5521–5523 had been based on Sections 10

in *United States* v. *Reese*, 92 U. S. 214. The other sections of the Revised Statutes which were covered by the repealing act had, in the main, provided in great detail for the federal regulation, supervision, and control of all elections at which members of Congress were chosen, without regard to whether a particular practice specifically proscribed constituted an impairment of a federal right of suffrage otherwise conferred; and none of them punished conspiracies, as such, to deprive citizens of federal rights. The emphasis in the legislative committee reports and debates that preceded the enactment of the repealing statute was upon the asserted unconstitutionality of some of the sections (as pointed out above, two of them had been held unconstitutional in *United States* v. *Reese*) and upon the corruption that was claimed to have accompanied the control of elections by federal supervisors.[12] Sections 5508 and 5510 of

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and 11 of the latter; and Section 5520 had been a reenactment of Section 2 of the Act of April 20, 1871 (c. 22, 17 Stat. 13), entitled "An Act to enforce the Provisions of the Fourteenth Amendment * * *."

The repealing Act of 1894 also provided that "all other statutes and parts of statutes *relating in any manner to supervisors of election and special deputy marshals be*, and the same are hereby repealed" [emphasis supplied].

[12] See H. Rep. No. 18, 53d Cong., 1st Sess., H. R. 2331; 25 Cong. Rec. 1803–1823, 1855–1864, 1897–1906, 1937–1963, 1987–2001, 2018–2049, 2080–2100, 2138–2150, 2158–2183, 2212–2258, 2272–2294, 2296–2327, 2338–2360, 2375–2378; 26 Cong. Rec. 382–384, 868–876, 925–934, 980–983, 1227–1231, 1237–1240, 1313–1325, 1380–1384, 1447–1452, 1580–1592, 1632–1639, 1858–1877, 1925–1941, 1976–1999.

the Revised Statutes (now Sections 19 and 20 of the Criminal Code) were not included in the repealing act, either as introduced or as passed, and we have found no trace of a suggestion by anyone at the time that either should have been included.[43] Yet this Court, ten years before the adoption of the repealing act, in *Ex parte Yarbrough,* 110 U. S. 651, already had held that the right of suffrage was within the protection of Section 5508 of the Revised Statutes, and had expressed exactly the same view of the scope of the federal right that was later expressed more fully in the *Classic* case (313 U. S. at 314–315), namely, that the statutes "define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall vote for members of Congress in that State. * * * It is not true, therefore, that electors for members of Congress owe their right to vote to the State law in any sense which makes the exercise of the right to depend exclusively on the law of the State" (110 U. S. at 663–664). Congress thus cannot be assumed to have been unaware, in 1894, of the fact that its

[43] The proximity of Sections 5508 and 5510 of the Revised Statutes (Sections 19 and 20 of the Criminal Code) to other sections of the Revised Statutes that were repealed, *viz;* Sections 5506 and 5511–5515, is a clear enough indication that the failure to repeal Sections 5508 and 5510 was not an oversight on the part of Congress.

failure to repeal Section 5508 of the Revised Statutes left punishable by federal law conspiracies to violate federal rights by acts which, if done by a single individual, were no longer so punishable, by virtue of the repeal of other sections which had applied to them without regard to their effect upon federal rights otherwise conferred.

The Criminal Code was adopted in 1909, and again carried over without change the unrepealed Sections 5508 and 5510 of the Revised Statutes (except for certain slight verbal changes in Section 5510). Again, Congress was fully aware of the broad scope of these sections, and of the fact that the retention of Section 5508 meant continued federal prohibition against conspiracies to impair the federal rights of citizens by means of actions which, though originally covered by various sections of the Enforcement Act, were no longer punishable under federal law when committed individually. This is indicated by the statement of Senator Heyburn of Idaho, manager of the bill on the floor of the Senate, that the opposition to the whole program of codifying the federal criminal law was spurred by a purpose "on the part of the minority that the Congress of the United States shall abandon all legislation dealing with offenses against the elective franchise—the civil rights of citizens." In response to this charge Senator Daniel of Virginia, describing himself as one of the minority referred to but

disclaiming knowledge of any such purpose, submitted what he called "some references in relation to the matter referred to by the Senator from Idaho." Among these "references" was the following:

> Section 5508 is carried into code bill without change. It is a general-conspiracy section; has been repeatedly held constitutional and relates to conspiracy against any right of a citizen, and has in recent years been invoked for many offenses having no relation to any race question. It is section 19 in the penal-code bill. (43 Cong. Rec. 3598–3599.)

The legislative history of Section 19 thus fully sustains the analysis made by Mr. Justice Holmes in the *Mosley* case. It indicates no reason why a conspiracy to impair by ballot-box "stuffing" the constitutional right of citizens to vote in congressional elections, is any the less within the coverage of Section 19 than conspiracies to omit from the count or to alter ballots properly cast, as in the *Mosley* and *Classic* cases. In its effects upon the constitutional right of suffrage the one type of conspiracy has been shown to be indistinguishable from the others. We therefore submit that the *Mosley* and *Classic* decisions are controlling, and that the conspiracy here involved falls within the "unambiguous" language of Section 19 which protects *all* the federal rights of citizens from conspiracies aimed at their deprivation or impairment.

CONCLUSION

On the basis of the foregoing discussion we respectfully submit that the orders of the court below, sustaining the demurrers to the indictments, should be reversed, and the cases remanded for trial.

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TOM C. CLARK,
Assistant Attorney General.
CHESTER T. LANE,
EDWARD G. JENNINGS,
Special Assistants to the Attorney General.

APRIL 1944.

APPENDIX A

[In this and the following appendices the footnote references indicate subsequent disposition made of each section by Congress, whether by repeal, amendment, or retention in existing law.]

Act of April 9, 1866 (c. 31, 14 Stat. 27):

An Act to protect all Persons in the United States in their Civil Rights, and furnish the Means of their vindication [1].

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment,

[1] This was the first of the three "Civil Rights" Acts. While it has not been referred to in the brief, we are setting it forth in full in order to provide in the appendices a full picture of the Civil Rights legislation of which the precursors of Sections 19 and 20 of the Criminal Code formed a part.

pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.[2]

SEC. 2. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by this act, or to different punishment, pains, or penalties on account of such person having at any time been held in a condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, or by reason of his color or race, than is prescribed for the punishment of white persons, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[3]

SEC. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any

[2] R. S. §§ 1978, 1992; 8 U. S. C. 42.

[3] See Section 18 of the Enforcement Act of May 31, 1870 (c. 114, 16 Stat. 140, 144), *infra*, p. 95).

State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.[4]

[4] R. S. § 722; 28 U. S. C. 729.

SEC. 4. *And be it further enacted,* That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, the officers and agents of the Freedmen's Bureau, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as by this act has cognizance of the offense. And with a view to affording reasonable protection to all persons in their constitutional rights of equality before the law, without distinction of race or color, or previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of the United States and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard

authorized by law to exercise with regard to other offences against the laws of the United States.[3]

SEC. 5. *And be it further enacted*, That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person upon whom the accused is alleged to have committed the offence. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their counties respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties; and the persons so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the clause of the

[3] R. S. §§ 1982–1983; 8 U. S. C. 49, 50.

Constitution which prohibits slavery, in conformity with the provisions of this act; and said warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.*

SEC. 6. *And be it further enacted,* That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer, or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them, from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer, other person, or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for either of said offences, be subject to a fine not exceeding one thousand dollars and imprisonment not exceeding six months, by indictment and conviction before the district court of the United States for the district in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within

* R. S. §§ 1984–1985; 8 U. S. C. 50, 51.

any one of the organized Territories of the United States.

SEC. 7. *And be it further enacted*, That the district attorneys, the marshals, their deputies, and the clerks of the said district and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases; and in all cases where the proceedings are before a commissioner, he shall be entitled to a fee of ten dollars in full for his services in each case, inclusive of all services incident to such arrest and examination. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to a fee of five dollars for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention, and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by the officers of the courts of justice within the proper district or county, as near as may be practicable, and paid out of the Treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recover-

able from the defendant as part of the judgment in case of conviction.[7]

SEC. 8. *And be it further enacted,* That whenever the President of the United States shall have reason to believe that offences have been or are likely to be committed against the provisions of this act within any judicial district, it shall be lawful for him, in his discretion, to direct the judge, marshal, and district attorney of such district to attend at such place within the district, and for such time as he may designate, for the purpose of the more speedy arrest and trial of persons charged with a violation of this act; and it shall be the duty of every judge or other officer, when any such requisition shall be received by him, to attend at the place and for the time therein designated.[8]

SEC. 9. *And be it further enacted,* That it shall be lawful for the President of the United States, or such person as he may empower for that purpose, to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to prevent the violation and enforce the due execution of this act.[9]

SEC. 10. *And be it further enacted,* That upon all questions of law arising in any cause under the provisions of this act a final appeal may be taken to the Supreme Court of the United States.

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[7] R. S. §§ 1986–1987; 8 U. S. C. 52, 53.

[8] R. S. § 1988; 8 U. S. C. 54.

[9] R. S. § 1989; 8 U. S. C. 55.

APPENDIX B

Enforcement Act of May 31, 1870 (c. 114, 16 Stat. 140):

An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes

Be it enacted by the Senate and the House of Representatives of the United States of America in Congress assembled, That all citizens of the United States who are or shall be otherwise qualified by law to vote at any election by the people in any State, Territory, district, county, city, parish, township, school district, municipality, or other territorial subdivision, shall be entitled and allowed to vote at all such elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation of any State or Territory, or by or under its authority, to the contrary notwithstanding.[1]

SEC. 2. *And be it further enacted,* That if by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to be done as a prerequisite or qualification for voting, and by such constitution or laws persons or officers are or shall be charged with the performance of duties in furnishing to citizens an oppor-

[1] R. S. § 2004; 8 U. S. C. 31.

tunity to perform such prerequisite, or to become qualified to vote, it shall be the duty of every such person and officer to give to all citizens of the United States the same and equal opportunity to perform such prerequisite, and to become qualified to vote without distinction of race, color, or previous condition of servitude; and if any such person or officer shall refuse or knowingly omit to give full effect to this section, he shall, for every such offense, forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also, for every such offense, be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned for not less than one month and not more than one year, or both, at the discretion of the court.[2]

SEC. 3. *And be it further enacted,* That whenever, by or under the authority of the constitution or laws of any State, or the laws of any Territory, any act is or shall be required to [be] done by any citizen as a prerequisite to qualify or entitle him to vote, the offer of any such citizen to perform the act required to be done as aforesaid shall, if it fail to be carried into execution by reason of the wrongful act or omission aforesaid of the person or officer charged with the duty of receiving or permitting such performance or offer to perform, or acting thereon, be deemed and held as a performance in law of such act; and the person so offering and failing as

[2] R. S. §§ 2005–2006, repealed by the Act of February 8, 1894 (c. 25, 28 Stat. 36).

aforesaid, and being otherwise qualified, shall be entitled to vote in the same manner and to the same extent as if he had in fact performed such act; and any judge, inspector, or other officer of election whose duty it is or shall be to receive, count, certify, register, report, or give effect to the vote of any such citizen who shall wrongfully refuse or omit to receive, count, certify, register, report, or give effect to the vote of such citizen upon the presentation by him of his affidavit stating such offer and the time and place thereof, and the name of the officer or person whose duty it was to act thereon, and that he was wrongfully prevented by such person or officer from performing such act, shall for every such offense forfeit and pay the sum of five hundred dollars to the person aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.[3]

SEC. 4. *And be it further enacted,* That if any person, by force, bribery, threats, intimidation, or other unlawful means, shall hinder, delay, prevent, or obstruct, or shall combine and confederate with others to hinder, delay, prevent, or obstruct, any citizen from doing any act required to be done to qualify him to vote or from voting at any election as aforesaid, such person shall for every such offence forfeit and pay the sum of five hundred dollars to the per-

[3] R. S. §§ 2007–2008, repealed by Act of February 8, 1894.

son aggrieved thereby, to be recovered by an action on the case, with full costs, and such allowance for counsel fees as the court shall deem just, and shall also for every such offence be guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.[4]

SEC. 5. *And be it further enacted,* That if any person shall prevent, hinder, control, or intimidate, or shall attempt to prevent, hinder, control, or intimidate, any person from exercising or in exercising the right of suffrage, to whom the right of suffrage is secured or guaranteed by the fifteenth amendment to the Constitution of the United States, by means of bribery, threats, or threats of depriving such person of employment or occupation, or of ejecting such person from rented house, lands, or other property, or by threats of refusing to renew leases or contracts for labor, or by threats of violence to himself or family, such person so offending shall be deemed guilty of a misdemeanor, and shall, on conviction thereof, be fined not less than five hundred dollars, or be imprisoned not less than one month and not more than one year, or both, at the discretion of the court.[5]

SEC. 6. *And be it further enacted,* That if two or more persons shall band or conspire together, or go in disguise upon the public highway, or upon the premises of another, with intent to violate any provision

[4] R. S. §§ 2009, 5506, repealed by Act of February 8, 1894.

[5] R. S. §§ 5507, repealed by Act of March 4, 1909 (c. 321, § 341, 35 Stat. 1088, 1153–1154).

of this act, or to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the Constitution or laws of the United States, or because of his having exercised the same, such persons shall be held guilty of felony, and, on conviction thereof, shall be fined or imprisoned, or both, at the discretion of the court, the fine not to exceed five thousand dollars, and the imprisonment not to exceed ten years, and shall, moreover, be thereafter ineligible to, and disabled from holding, any office or place of honor, profit, or trust created by the Constitution or laws of the United States.[6]

SEC. 7. *And be it further enacted,* That if in the act of violating any provision in either of the two preceding sections, any other felony, crime, or misdemeanor shall be committed, the offender, on conviction of such violation of said sections, shall be punished for the same with such punishments as are attached to the said felonies, crimes, and misdemeanors by the laws of the State in which the offence may be committed.[7]

SEC. 8. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes,

[6] R. S. § 5508; 18 U. S. C. 51 (Section 19 of the Criminal Code).

[7] R. S. § 5509, repealed by Act of March 4, 1909 (c. 321, § 341, 35 Stat. 1088, 1153–1154).

civil and criminal, arising under this act, except as herein otherwise provided, and the jurisdiction hereby conferred shall be exercised in conformity with the laws and practice governing United States courts; and all crimes and offences committed against the provisions of this act may be prosecuted by the indictment of a grand jury, or, in cases of crimes and offences not infamous, the prosecution may be either by indictment or information filed by the district attorney in a court having jurisdiction.[1]

SEC. 9. *And be it further enacted*, That the district attorneys, marshals, and deputy marshals of the United States, the commissioners appointed by the circuit and territorial courts of the United States, with powers of arresting, imprisoning, or bailing offenders against the laws of the United States, and every other officer who may be specially empowered by the President of the United States, shall be, and they are hereby, specially authorized and required, at the expense of the United States, to institute proceedings against all and every person who shall violate the provisions of this act, and cause him or them to be arrested and imprisoned, or bailed, as the case may be, for trial before such court of the United States or territorial court as has cognizance of the offense. And with a view to afford reasonable protection to all persons in their constitutional right to vote without distinction of race, color, or previous condition of servitude, and to the prompt discharge of the duties of this act, it shall be the duty of the circuit courts of

[1] R. S. §§ 629, 1022; 28 U. S. C. 41 (2) (Section 24 of the Judicial Code), 18 U. S. C. 555.

the United States, and the superior courts of the Territories of the United States, from time to time, to increase the number of commissioners, so as to afford a speedy and convenient means for the arrest and examination of persons charged with a violation of this act; and such commissioners are hereby authorized and required to exercise and discharge all the powers and duties conferred on them by this act, and the same duties with regard to offences created by this act as they are authorized by law to exercise with regard to other offences against the laws of the United States.[9]

SEC. 10. *And be it further enacted,* That it shall be the duty of all marshals and deputy marshals to obey and execute all warrants and precepts issued under the provisions of this act, when to them directed; and should any marshal or deputy marshal refuse to receive such warrant or other process when tendered, or to use all proper means diligently to execute the same, he shall, on conviction thereof, be fined in the sum of one thousand dollars, to the use of the person deprived of the rights conferred by this act. And the better to enable the said commissioners to execute their duties faithfully and efficiently, in conformity with the Constitution of the United States and the requirements of this act, they are hereby authorized and empowered, within their districts respectively, to appoint, in writing, under their hands, any one or more suitable persons, from time to time, to execute all such warrants and other process as may be issued by them in the lawful performance of their respective duties, and the persons

[9] R. S. §§ 1982–1983; 8 U. S. C. 49–50.

so appointed to execute any warrant or process as aforesaid shall have authority to summon and call to their aid the bystanders or posse comitatus of the proper county, or such portion of the land or naval forces of the United States, or of the militia, as may be necessary to the performance of the duty with which they are charged, and to insure a faithful observance of the fifteenth amendment to the Constitution of the United States; and such warrants shall run and be executed by said officers anywhere in the State or Territory within which they are issued.[10]

SEC. 11. *And be it further enacted,* That any person who shall knowingly and wilfully obstruct, hinder, or prevent any officer or other person charged with the execution of any warrant or process issued under the provisions of this act, or any person or persons lawfully assisting him or them from arresting any person for whose apprehension such warrant or process may have been issued, or shall rescue or attempt to rescue such person from the custody of the officer or other person or persons, or those lawfully assisting as aforesaid, when so arrested pursuant to the authority herein given and declared, or shall aid, abet, or assist any person so arrested as aforesaid, directly or indirectly, to escape from the custody of the officer or other person legally authorized as aforesaid, or shall harbor or conceal any person for whose arrest a warrant or process shall have been issued as aforesaid, so as to prevent his discovery and arrest after notice or knowledge of the fact that a warrant has been issued for the apprehension of such person, shall, for

[10] R. S. §§ 1984–1985, 5517; 8 U. S. C. 50–51.

either of said offences, be subject to a fine not exceeding one thousand dollars, or imprisonment not exceeding six months, or both, at the discretion of the court, on conviction before the district or circuit court of the United States for the district or circuit in which said offence may have been committed, or before the proper court of criminal jurisdiction, if committed within any one of the organized Territories of the United States.[11]

SEC. 12. *And be it further enacted,* That the commissioners, district attorneys, the marshals, their deputies, and the clerks of the said district, circuit, and territorial courts shall be paid for their services the like fees as may be allowed to them for similar services in other cases. The person or persons authorized to execute the process to be issued by such commissioners for the arrest of offenders against the provisions of this act shall be entitled to the usual fees allowed to the marshal for an arrest for each person he or they may arrest and take before any such commissioner as aforesaid, with such other fees as may be deemed reasonable by such commissioner for such other additional services as may be necessarily performed by him or them, such as attending at the examination, keeping the prisoner in custody, and providing him with food and lodging during his detention and until the final determination of such commissioner, and in general for performing such other duties as may be required in the premises; such fees to be made up in conformity with the fees usually charged by

[11] R. S. § 5516, repealed by Act of March 4, 1909 (c. 321, § 341, 35 Stat. 1088, 1153–1154), but reenacted in revised form as § 141 of the Criminal Code (18 U. S. C. 246).

the officers of the courts of justice within the proper district or county as near as may be practicable, and paid out of the treasury of the United States on the certificate of the judge of the district within which the arrest is made, and to be recoverable from the defendant as part of the judgment in case of conviction.[12]

SEC. 13. *And be it further enacted,* That it shall be lawful for the President of the United States to employ such part of the land or naval forces of the United States, or of the militia, as shall be necessary to aid in the execution of judicial process issued under this act.[13]

SEC. 14. *And be it further enacted,* That whenever any person shall hold office, except as a member of Congress or of some State legislature, contrary to the provisions of the third section of the fourteenth article of amendment of the Constitution of the United States, it shall be the duty of the district attorney of the United States for the district in which such person shall hold office, as aforesaid, to proceed against such person, by writ of quo warranto, returnable to the circuit or district court of the United States in such district, and to prosecute the same to the removal of such person from office; and any writ of quo warranto so brought, as aforesaid, shall take precedence of all other cases on the docket of the court to which it is made returnable, and shall not be continued unless for cause proved to the satisfaction of the court.[14]

[12] R. S. §§ 1986–1987; 8 U. S. C. 52–53.
[13] R. S. § 1989; 8 U. S. C. 55.
[14] R. S. § 1786; 5 U. S. C. 11a.

SEC. 15. *And be it further enacted,* That any person who shall hereafter knowingly accept or hold any office under the United States, or any State to which he is ineligible under the third section of the fourteenth article of amendment of the Constitution of the United States, or who shall attempt to hold or exercise the duties of any such office, shall be deemed guilty of a misdemeanor against the United States, and, upon conviction thereof before the circuit or district court of the United States, shall be imprisoned not more than one year, or fined not exceeding one thousand dollars, or both, at the discretion of the court.[15]

SEC. 16. *And be it further enacted,* That all persons within the jurisdiction of the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of person and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country; and any

[15] R. S. § 1787, repealed by Act of March 4, 1909 (c. 321, § 341, 35 Stat. 1088, 1153).

law of any State in conflict with this provision is hereby declared null and void.[16]

SEC. 17. *And be it further enacted,* That any person who, under color of any law, statute, ordinance, regulation, or custom, shall subject, or cause to be subjected, any inhabitant of any State or Territory to the deprivation of any right secured or protected by the last preceding section of this act, or to different punishment, pains, or penalties on account of such person being an alien, or by reason of his color or race, than is prescribed for the punishment of citizens, shall be deemed guilty of a misdemeanor, and, on conviction, shall be punished by fine not exceeding one thousand dollars, or imprisonment not exceeding one year, or both, in the discretion of the court.[17]

SEC. 18. *And be it further enacted,* That the act to protect all persons in the United States in their civil rights, and furnish the means of their vindication, passed April nine, eighteen hundred and sixty-six, is hereby re-enacted; and sections sixteen and seventeen hereof shall be enforced according to the provisions of said act.[18]

SEC. 19. *And be it further enacted,* That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once at the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any

[16] R. S. §§ 1977, 2164; 8 U. S. C. 41, 135.
[17] R. S. § 5510; 18 U. S. C. 52.
[18] R. S. § 722; 28 U. S. C. 729.

unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America or of any Territory thereof, from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction, and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or

both, in the discretion of the court, and shall pay the costs of prosecution.[19]

SEC. 20. *And be it further enacted,* That if, at any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote, or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act, the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and

[19] R. S. § 5511, repealed by Act of February 8, 1894 (c. 25, 28 Stat. 36).

punishment therefor, as provided in section nineteen of this act for persons guilty of any of the crimes therein specified: *Provided,* That every registration made under the laws of any State or Territory, for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purposes of any State, territorial, or municipal election.[20]

'SEC. 21. *And be it further enacted,* That whenever, by the laws of any State or Territory, the name of any candidate or person to be voted for as representative or delegate in Congress shall be required to be printed, written, or contained in any ticket or ballot with other candidates or persons to be voted for at the same election for State, territorial, municipal, or local officers, it shall be sufficient prima facie evidence, either for the purpose of indicting or convicting any person charged with voting, or attempting or offering to vote, unlawfully under the provisions of the preceding sections, or for committing either of the offenses thereby created, to prove that the person so charged or indicted, voted, or attempted or offered to vote, such ballot or ticket, or committed either of the offenses named in the preceding sections of this act with reference to such ballot. And the proof and establishment of such facts shall be taken, held, and deemed to be presumptive evidence that such person voted, or attempted or offered to vote, for such representative or delegate, as the case may be, or that such offense was committed with refer-

[20] R. S. § 5512, repealed by Act of February 8, 1894.

ence to the election of such representative or delegate, and shall be sufficient to warrant his conviction, unless it shall be shown that any such ballot, when cast, or attempted or offered to be cast, by him, did not contain the name of any candidate for the office of representative or delegate in the Congress of the United States, or that such offense was not committed with reference to the election of such representative or delegate.[21]

SEC. 22. *And be it further enacted*, That any officer of any election at which any representative or delegate in the Congress of the United States shall be voted for, whether such officer of election be appointed or created by or under any law or authority of the United States, or by or under any State, territorial, district, or municipal law or authority, who shall neglect or refuse to perform any duty in regard to such election required of him by any law of the United States, or of any State or Territory thereof; or violate any duty so imposed, or knowingly do any act thereby unauthorized, with intent to affect any such election, or the result thereof; or fraudulently make any false certificate of the result of such election in regard to such representative or delegate; or withhold, conceal, or destroy any certificate of record so required by law respecting, concerning, or pertaining to the election of any such representative or delegate; or neglect or refuse to make and return the same as so required by law; or aid, counsel, procure, or advise any voter, person, or officer to do any act by this or any of the preceding sections made a crime; or to omit to do any duty the omission of

[21] R. S. § 5514, repealed by Act of February 8, 1894.

which is by this or any of said sections made a crime, or attempt to do so, shall be deemed guilty of a crime and shall be liable to prosecution and punishment therefor, as provided in the nineteenth section of this act for persons guilty of any of the crimes therein specified.[22]

SEC. 23. *And be it further enacted,* That whenever any person shall be defeated or deprived of his election to any office, except elector of President or Vice-President, representative or delegate in Congress, or member of a State legislature, by reason of the denial to any citizen or citizens who shall offer to vote, of the right to vote, on account of race, color, or previous condition of servitude, his right to hold and enjoy such office, and the emoluments thereof, shall not be impaired by such denial; and such person may bring any appropriate suit or proceeding to recover possession of such office, and in cases where it shall appear that the sole question touching the title to such office arises out of the denial of the right to vote to citizens who so offered to vote, on account of race, color, or previous condition of servitude, such suit or proceeding may be instituted in the circuit or district court of the United States of the circuit or district in which such person resides. And said circuit or district court shall have, concurrently with the State courts, jurisdiction thereof so far as to determine the rights of the parties to such office by reason of the denial of the right guaranteed by the fifteenth article of amendment to the Constitution of the United States, and secured by this act.[23]

[22] R. S. § 5515, repealed by Act of February 8, 1894.

[23] R. S. § 2010, repealed by Act of February 8, 1894.

APPENDIX C

Act of July 14, 1870 (c. 254, 16 Stat. 254):

An Act to amend the Naturalization Laws and to punish Crimes against the same, and for other Purposes.

* * * * * *

SEC. 5. *And be it further enacted,* That in any city having upwards of twenty thousand inhabitants, it shall be the duty of the judge of the circuit court of the United States for the circuit wherein said city shall be, upon the application of two citizens, to appoint in writing for each election district or voting precinct in said city, and to change or renew said appointment as occasion may require, from time to time, two citizens resident of the district or precinct, one from each political party, who, when so designated, shall be, and are hereby, authorized to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for representative in Congress, and at all times and places for holding elections of representatives in Congress, and for counting the votes cast at said elections, and to challenge any name proposed to be registered, and any vote offered, and to be present and witness throughout the counting of all votes, and to remain where the ballot-boxes are kept at all times after the polls are open until the votes are finally counted; and said persons and either of them shall have the

right to affix their signature or his signature to said register for purposes of identification, and to attach thereto, or to the certificate of the number of votes cast, *and* [any] statement touching the truth or fairness thereof which they or he may ask to attach; and any one who shall prevent any person so designated from doing any of the acts authorized as aforesaid, or who shall hinder or molest any such person in doing any of the said acts, or shall aid or abet in preventing, hindering, or molesting any such person in respect of any such acts, shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment not less than one year.

SEC. 6. *And be it further enacted,* That in any city having upwards of twenty thousand inhabitants, it shall be lawful for the marshal of the United States for the district wherein said city shall be, to appoint as many special deputies as may be necessary to preserve order at any election at which representatives in Congress are to be chosen; and said deputies are hereby authorized to preserve order at such elections, and to arrest for any offence or breach of the peace committed in their view.[1]

* * * * *

[1] The above sections of the Act of July 14, 1870, were repealed by Section 18 of the Act of February 28, 1871 (c. 99, 16 Stat. 433, 440), for which see *infra*, p. 102.

APPENDIX D.

Act of February 28, 1871 (c. 99, 16 Stat. 433):

An Act to amend an Act approved May thirty-one, eighteen hundred and seventy, entitled "An Act to enforce the Rights of Citizens of the United States to vote in the several States of this Union, and for other Purposes"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty of the "Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May thirty-one, eighteen hundred and seventy, shall be, and hereby is, amended so as to read as follows:

"SEC. 20. *And be it further enacted,* That if, [at] any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising

such right; or compel or induce, by any of such means, or other unlawful means, any officer of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer shall knowingly and wilfully register as a voter any person not entitled to be registered, or refuse to so register any person entitled to be registered; or if any such officer or other person whose duty it is to perform any duty in relation to such registration or election, or to ascertain, announce, or declare the result thereof, or give or make any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law, or violate any duty imposed by law, or do any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person shall aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor as provided in section nineteen of said act of May thirty-one, eighteen hundred and seventy, for persons guilty of any of the crimes therein specified: *Provided,* That every registration made under the laws of any State or Territory for any State or

other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purpose of any State, territorial, or municipal election."[1]

SEC. 2. *And be it further enacted,* That whenever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens thereof who, prior to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, shall make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town shall be, their desire to have said registration, or said election, or both, guarded and scrutinized, it shall be the duty of the said judge of the circuit court, within not less than ten days prior to said registration, if one there be, or, if no registration be required, within not less than ten days prior to said election, to open the said circuit court at the most convenient point in said circuit. And the said court, when so opened by said judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the said circuit judge, and under the seal of said court, for each election district or voting precinct in each and every such city or town as shall, in the manner herein prescribed, have applied therefor, and to revoke, change, or renew said appointment from time to time, two

[1] R. S. §§ 5512–5513, repealed by Act of February 8, 1894 (c. 25, 28 Stat. 36).

citizens, residents of said city or town, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election. And the said circuit court, when opened by the said circuit judge as required herein, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.[2]

SEC. 3. *And be it further enacted,* That whenever, from sickness, injury, or otherwise, the judge of the circuit court of the United States in any judicial circuit shall be unable to perform and discharge the duties by this act imposed, it shall be his duty, and he is hereby required, to select and to direct and assign to the performance thereof, in his place and stead, such one of the judges of the district courts of the United States within his circuit as he shall deem best; and upon such selection and assignment being made, it shall be lawful for, and shall be the duty of, the district judge so designated to perform and discharge, in the place and stead of the said circuit judge, all the duties, powers, and obligations imposed and conferred upon the said circuit judge by the provisions of this act.[3]

[2] R. S. §§ 2011–2013, repealed by Act of February 8, 1894.
[3] R. S. § 2014, repealed by Act of February 8, 1894.

SEC. 4. *And be it further enacted,* That it shall be the duty of the supervisors of election, appointed under this act, and they and each of them are hereby authorized and required, to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress, and to challenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they shall deem proper to be so marked; to make, when required, the lists, or either of them, provided for in section thirteen of this act, and verify the same; and upon any occasion, and at any time when in attendance under the provisions of this act, to personally inspect and scrutinize such registry, and for purposes of identification to affix their or his signature to each and every page of the original list, and of each and every copy of any such list of registered voters, at such times, upon each day when any name may or shall be received, entered, or registered, and in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names.[1]

SEC. 5. *And be it further enacted,* That it shall also be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required, to attend at all times and places for holding elections of representatives or delegates in Congress, and for counting the votes cast at said elections; to challenge any vote offered by any

[1] R. S. § 2016, repealed by the Act of February 8, 1894.

canvassing the ballots in said boxes contained as will enable them or him to fully perform the duties in respect to such canvass provided in this act, and shall there remain until every duty in respect to such canvass, certificates, returns, and statements shall have been wholly completed, any law of any State or Territory to the contrary notwithstanding.*

SEC. 7. *And be it further enacted,* That if any election district or voting precinct in any city, town, or village, for which there shall have been appointed supervisors of election for any election at which a representative or delegate in Congress shall be voted for, the said supervisors of election, or either of them, shall not be allowed to exercise and discharge, fully and freely, and without bribery, solicitation, interference, hindrance, molestation, violence, or threats thereof, on the part of or from any person or persons, each and every of the duties, obligations, and powers conferred upon them by this act and the act hereby amended, it shall be the duty of the supervisors of election, and each of them, to make prompt report, under oath, within ten days after the day of election, to the officer who, in accordance with the provisions of section thirteen of this act, shall have been designated as the chief supervisor of the judicial district in which the city or town wherein they or he served shall be, of the manner and means by which they were, or he was, not so allowed to fully and freely exercise and discharge the duties and obligations required and imposed by this act. And upon receiving any such report, it shall be the duty of the said

* R. S. § 2019, repealed by the Act of February 8, 1894.

chief supervisor, acting both in such capacity and officially as a commissioner of the circuit court, to forthwith examine into all the facts thereof; to subpoena and compel the attendance before him of any witnesses; administer oaths and take testimony in respect to the charges made; and prior to the assembling of the Congress for which any such representative or delegate was voted for, to have filed with the clerk of the House of Representatives of the Congress of the United States all the evidence by him taken, all information by him obtained, and all reports to him made.'

SEC. 8. *And be it further enacted,* That whenever an election at which representatives or delegates in Congress are to be chosen shall be held in any city or town of twenty thousand inhabitants or upward, the marshal of the United States for the district in which said city or town is situated shall have power, and it shall be his duty, on the application, in writing, of at least two citizens residing in any such city or town, to appoint special deputy marshals, whose duty it shall be, when required as provided in this act, to aid and assist the supervisors of election in the verification of any list of persons made under the provisions of this act, who may have registered, or voted, or either; to attend in each election district or voting precinct at the times and places fixed for the registration of voters, and at all times and places when and where said registration may by law be scrutinized, and the names of registered voters be marked for challenge; and also to attend, at all times for

[1] R. S. § 2020, repealed by the Act of February 8, 1894.

holding such elections, the polls of the election in such district or precinct. And the marshal and his general deputies, and such special deputies, shall have power, and it shall be the duty of such special deputies, to keep the peace, and support and protect the supervisors of elections in the discharge of their duties, preserve order at such places of registration and at such polls, prevent fraudulent registration and fraudulent voting thereat, or fraudulent conduct on the part of any officer of election, and immediately, either at said place of registration or polling-place, or elsewhere, and either before or after registering or voting, to arrest and take into custody, with or without process, any person who shall commit, or attempt or offer to commit, any of the acts of offences prohibited by this act, or the act hereby amended, or who shall commit any offence against the laws of the United States: *Provided,* That no person shall be arrested without process for any offence not committed in the presence of the marshal or his general or special deputies, or either of them, or of the supervisors of election, or either of them, and, for the purposes of arrest or the preservation of the peace, the supervisors of election, and each of them, shall, in the absence of the marshal's deputies, or if required to assist said deputies, have the same duties and powers as deputy marshals: *And provided further,* That no person shall, on the day or days of any such election, be arrested without process for any offence committed on the day or days of registration.*

* R. S. §§ 2021–2022, repealed by the Act of February 8, 1894.

SEC. 9. *And be it further enacted,* That whenever any arrest is made under any provision of this act, the person so arrested shall forthwith be brought before a commissioner, judge, or court of the United States for examination of the offences alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.*

SEC. 10. *And be it further enacted,* That whoever, with or without any authority, power, or process, or pretended authority, power, or process, of any State, territorial, or municipal authority, shall obstruct, hinder, assault, or by bribery, solicitation, or otherwise, interfere with or prevent the supervisors of election, or either of them, or the marshal or his general or special deputies, or either of them, in the performance of any duty required of them, or either of them, or which he or they, or either of them, may be authorized to perform by any law of the United States, whether in the execution of process or otherwise, or shall by any of the means before mentioned hinder or prevent the free attendance and presence at such places of registration or at such polls of election, or full and free access and egress to and from any such place of registration or poll of election, or in going to and from any such place of registration or poll of election, or to and from any room where any such registration or election or canvass of votes, or of making any returns or certificates thereof, may be had, or shall molest, interfere with, remove, or eject from any such place of registration or poll of election, or of can-

* R. S. § 2023, repealed by the Act of February 8, 1894.

vassing votes cast thereat, or of making returns or certificates thereof, any supervisor of election, the marshal, or his general or special deputies, or either of them, or shall threaten, or attempt, or offer so to do, or shall refuse or neglect to aid and assist any supervisor of election, or the marshal or his general or special deputies, or either of them, in the performance of his or their duties when required by him or them, or either of them, to give such aid and assistance, he shall be guilty of a misdemeanor, and liable to instant arrest without process, and on conviction thereof shall be punished by imprisonment nor more than two years, or by fine not more than three thousand dollars, or by both such fine and imprisonment, and shall pay the costs of the prosecution. Whoever shall, during the progress of any verification of any list of the persons who may have registered or voted, and which shall be had or made under any of the provisions of this act, refuse to answer, or refrain from answering, or answering shall knowingly give false information in respect to any inquiry lawfully made, such person shall be liable to arrest and imprisonment as for a misdemeanor, and on conviction thereof shall be punished by imprisonment not to exceed thirty days, or by fine not to exceed one hundred dollars, or by both such fine and imprisonment, and shall pay the costs of the prosecution.[10]

SEC. 11. *And be it further enacted,* That whoever shall be appointed a supervisor of election or a special deputy marshal under the provisions of this act, and shall take the oath of office as such supervisor of

[10] R. S. §§ 5522–5523, repealed by the Act of February 8, 1894.

election or such special deputy marshal, who shall thereafter neglect or refuse, without good and lawful excuse, to perform and discharge fully the duties, obligations, and requirements of such office until the expiration of the term for which he was appointed, shall not only be subject to removal from office with loss of all pay or emoluments, but shall be guilty of a misdemeanor, and on conviction shall be punished by imprisonment for not less than six months nor more than one year, or by fine not less than two hundred dollars and not exceeding five hundred dollars, or by both fine and imprisonment, and shall pay the costs of prosecution.[11]

SEC. 12. *And be it further enacted,* That the marshal, or his general deputies, or such special deputies as shall be thereto specially empowered by him, in writing, and under his hand and seal, whenever he or his said general deputies or his special deputies, or either or any of them, shall be forcibly resisted in executing their duties under this act, or the act hereby amended, or shall, by violence, threats, or menaces, be prevented from executing such duties, or from arresting any person or persons who shall commit any offence for which said marshal or his general or his special deputies are authorized to make such arrest, are, and each of them is hereby, empowered to summon and call to his or their aid the bystanders or posse comitatus of his district.[12]

SEC. 13. *And be it further enacted,* That it shall be the duty of each of the circuit courts of the United States in and for each

[11] R. S. § 5521, repealed by the Act of February 8, 1894.

[12] R. S. § 2024, repealed by the Act of February 8, 1894.

judicial circuit, upon the recommendation in writing of the judge thereof, to name and appoint, on or before the first day of May, in the year eighteen hundred and seventy-one, and thereafter as vacancies may from any cause arise, from among the circuit court commissioners in and for each judicial district in each of said judicial circuits, one of such officers, who shall be known for the duties required of him under this act as the chief supervisor of elections of the judicial district in and for which he shall be a commissioner, and shall, so long as faithful and capable, discharge the duties in this act imposed, and whose duty it shall be to prepare and furnish all necessary books, forms, blanks, and instructions for the use and direction of the supervisors of election in the several cities and towns in their respective districts; to receive the applications of all parties for appointment to such positions; and upon the opening, as contemplated in this act, of the circuit court for the judicial circuit in which the commissioner so designated shall act, to present such applications to the judge thereof, and furnish information to said judge in respect to the appointment by the said court of such supervisors of election; to require of the supervisors of election, where necessary, lists of the persons who may register and vote, or either, in their respective election districts or voting precincts, and to cause the names of those upon any such list whose right to register or vote shall be honestly doubted to be verified by proper inquiry and examination at the respective places by them assigned as their residences; and to receive, preserve, and file all oaths of office of said supervisors of elec-

tion, and of all special deputy marshals appointed under the provisions of this act, and all certificates, returns, reports, and records of every kind and nature contemplated or made requisite under and by the provisions of this act, save where otherwise herein specially directed. And it is hereby made the duty of all United States marshals and commissioners who shall in any judicial district perform any duties under the provisions of this act, or the act hereby amended, relating to, concerning, or affecting the election of representatives or delegates in the Congress of the United States, to, from time to time, and with all due diligence, forward to the chief supervisor in and for their judicial district all complaints, examinations, and records pertaining thereto, and all oaths of office by them administered to any supervisor of election or special deputy marshal, in order that the same may be properly preserved and filed.[13]

SEC. 14. *And be it further enacted,* That there shall be allowed and paid to each chief supervisor, for his services as such officer, the following compensation, apart from and in excess of all fees allowed by law for the performance of any duty as circuit court commissioner: For filing and caring for every return, report, record, document, or other paper required to be filed by him under any of the provisions of this act; ten cents; for affixing a seal to any paper, record, report, or instrument, twenty cents; for entering and indexing the records of his office, fifteen cents per folio; and for arranging and transmitting to Congress, as provided for in section seven of this act,

[13] R. S. §§ 2025–2027, repealed by the Act of February 8, 1894.

any report, statement, record, return, or examination, for each folio, fifteen cents; and for any copy thereof, or of any paper on file, a like sum. And there shall be allowed and paid to each and every supervisor of election, and each and every special deputy marshal who shall be appointed and shall perform his duty under the provisions of this act, compensation at the rate of five dollars per day for each and every day he shall have actually been on duty, not exceeding ten days. And the fees of the said chief supervisors shall be paid at the treasury of the United States, such accounts to be made out, verified, examined, and certified as in the case of accounts of commissioners, save that the examination or certificate required may be made by either the circuit or district judge.[14]

SEC. 15. *And be it further enacted,* That the jurisdiction of the circuit court of the United States shall extend to all cases in law or equity arising under the provisions of this act or the act hereby amended; and if any person shall receive any injury to his person or property for or on account of any act by him done under any of the provisions of this act or the act hereby amended, he shall be entitled to maintain suit for damages therefor in the circuit court of the United States in the district wherein the party doing the injury may reside or shall be found.[15]

SEC. 16. *And be it further enacted,* That in any case where suit or prosecution, civil or criminal, shall be commenced in a court of any State against any officer of the

[14] R. S. § 3689; 31 U. S. C. 711.
[15] R. S. § 629; 28 U. S. C. 41 (2).

United States, or other person, for or on account of any act done under the provisions of this act, or under color thereof, or for or on account of any right, authority, or title set up or claimed by such officer or other person under any of said provisions, it shall be lawful for the defendant in such suit or prosecution, at any time before trial, upon a petition to the circuit court of the United States in and for the district in which the defendant shall have been served with process, setting forth the nature of said suit or prosecution, and verifying the said petition by affidavit, together with a certificate signed by an attorney or counsellor at law of some court of record of the State in which such suit shall have been commenced, or of the United States, setting forth that as counsel for the petition[er] he has examined the proceedings against him, and has carefully inquired into all the matters set forth in the petition, and that he believes the same to be true, which petition, affidavit, and certificate shall be presented to the said circuit court, if in session, and, if not, to the clerk thereof at his office, and shall be filed in said office, and the cause shall thereupon be entered on the docket of said court, and shall be thereafter proceeded in as a cause originally commenced in that court; and it shall be the duty of the clerk of said court, if the suit was commenced in the court below by summons, to issue a writ of certiorari to the State court, requiring said court to send to the said circuit court the record and proceedings in said cause; or if it was commenced by capias, he shall issue a writ of habeas corpus cum causa, a duplicate of which said writ shall be de-

livered to the clerk of the State court, or left at his office by the marshal of the district, or his deputy, or some person duly authorized thereto; and thereupon it shall be the duty of the said State court to stay all further proceedings in such cause, and the said suit or prosecution, upon delivery of such process, or leaving the same as aforesaid, shall be deemed and taken to be moved to the said circuit court, and any further proceedings, trial, or judgment therein in the State court shall be wholly null and void; and any person, whether an attorney or officer of any State court, or otherwise, who shall thereafter take any steps, or in any manner proceed in the State court in any action so removed, shall be guilty of a misdemeanor, and liable to trial and punishment in the court to which the action shall have been removed, and upon conviction thereof shall be punished by imprisonment for not less than six months nor more than one year, or by fine not less than five hundred nor more than one thousand dollars, or by both such fine and imprisonment, and shall in addition thereto be amenable to the said court to which said action shall have been removed as for a contempt; and if the defendant in any such suit be in actual custody on mesne process therein, it shall be the duty of the marshal, by virtue of the writ of habeas corpus cum causa, to take the body of the defendant into his custody, to be dealt with in the said cause according to the rules of law and the order of the circuit court, or of any judge thereof in vacation. And all attachments made and all bail or other security given upon such suit or prosecution shall be and continue in

like force and effect as if the same suit or prosecution had proceeded to final judgment and execution in the State court. And if upon the removal of any such suit or prosecution it shall be made to appear to the said circuit court that no copy of the record and proceedings therein in the State court can be obtained, it shall be lawful for said circuit court to allow and require the plaintiff to proceed de novo, and to file a declaration of his cause of action, and the parties may thereupon proceed as in actions originally brought in said circuit court; and on failure of so proceeding judgment of non prosequitur may be rendered against the plaintiff, with costs for the defendant."[16]

SEC. 17. *And be it further enacted,* That in any case in which any party is or may be by law entitled to copies of the record and proceedings in any suit or prosecution in any State court, to be used in any court of the United States, if the clerk of said State court shall, upon demand and the payment or tender of the legal fees, refuse or neglect to deliver to such party certified copies of such record and proceedings, the court of the United States in which such record and proceedings may be needed, on proof by affidavit that the clerk of such State court has refused or neglected to deliver copies thereof on demand as aforesaid, may direct and allow such record to be supplied by affidavit or otherwise, as the circumstances of the case may require and allow; and thereupon such proceeding, trial, and judgment may be had in the said court of the United States, and all such processes awarded, as if certified copies of such

[16] R. S. §§ 643, 646.

records and proceedings had been regularly before the said court; and hereafter in all civil actions in the courts of the United States either party thereto may notice the same for trial."

SEC. 18. *And be it further enacted*, That sections five and six of the act of the Congress of the United States approved July fourteen, eighteen hundred and seventy, and entitled "An act to amend the naturalization laws, and to punish crimes against the same," be, and the same are hereby, repealed; but this repeal shall not affect any proceeding or prosecution now pending for any offence under the said sections, or either of them, or any question which may arise therein respecting the appointment of the persons in said sections, or either of them, provided for, or the powers, duties, or obligations of such persons.

SEC. 19. *And be it further enacted*, That all votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect."[17]

[17] R. S. §§ 645, 950; 28 U. S. C. 769.
[18] R. S. § 27; 2 U. S. C. 2.

U. S. GOVERNMENT PRINTING OFFICE: 1944

FILE COPY

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OCTOBER TERM, 1943.

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Appellant,

v.

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THE UNITED STATES OF AMERICA,
Appellant,

v.

CLARENCE POER, SIDNEY SOLOMON POPE, ODELL JAMES SHEPHERD and VERLIN FEE.

Appeals from the District Court of the United States for the Eastern District of Kentucky.

BRIEF FOR THE RESPONDENTS.

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SUMMARY OF ARGUMENT.

Under Section 19 of the Criminal Code the individual's Federal rights which are guarded and protected thereunder are definitely and unmistakably personal and subject to judicial enforcement, and not political and impersonal ones. **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861.

Under this section of the Penal Code it is not a punishable act to conspire to bribe voters. **United States v. Bathgate**, 246 U. S. 220. And in view of this Court's interpretation of this Statute in the **Bathgate** Case, it would seem that the act does not affect in any manner conspiracies to cast spurious ballots, or fictitious ballots, or conspiracies which have as their object the stuffing of ballot boxes.

There is no Federal statute which covers the act, or the conspiracy to commit the act of ballot box stuffing. According to the established policy of Congress, as interpreted by this Court in the **Bathgate** Case, the protection afforded the public from such acts is left to State laws. **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861; **Chavez v. United States**, 261 F. 174 (8 Cir.); **United States v. Kantor**, 78 F. (2d) 710 (2 Cir.).

The contention of the appellant that the casting of a spurious ballot is identical with that of altering or failing to count a vote as cast is basically erroneous. Section 19, clearly, and devoid of any ambiguity, protects the personal rights of the individual, and there is nothing in the statute that provides a basis for the Government's argument. To hold, as is now urged by the appellant, that this statute includes the acts complained of would nullify this Court's interpretation thereof in the **Mosley**, the **Gradwell**, and the **Bathgate** decisions.

ARGUMENT.

ORIGIN, SCOPE AND APPLICATION OF SECTION 19 OF THE CRIMINAL CODE.

By a lengthy, circuitous route, counsel for appellant attempts to make section 19 of the Criminal Code applicable to the facts set out in the indictments herein. A great portion of appellant's brief is devoted to a careful analysis of the effect the casting of spurious votes would have upon the result of an election and it is stated therein: "The effects of casting spurious ballots, and of altering or failing to count ballots properly cast, are virtually identical. Each spurious ballot cast for one candidate nullified a ballot validly cast for another candidate, and diminishes the proportionate weight to which every ballot properly cast is entitled. Where spurious voting in a precinct causes the returns of that precinct to be rejected, as in Emery v. Hennessy, 331 Ill. 296, and Scholl v. Bell, 125 Ky. 740 (1907), the effect is to disfranchise, in the particular election, every voter in the precinct. Where spurious voting changes the outcome of an election, it denies to everyone concerned the right of representation by the majority's choice."

Throughout the brief for appellant there is an apparent effort to "stretch" the intent and applicability of section 19, and appellant undertakes to analyze the section in question and arrive at the conclusion that Congress intended the section in question to apply to the "stuffing" of ballot boxes.

Rather than accept the argument of counsel for appellant as to the origin and meaning of section 19, we prefer to rely upon the expressions of this Court. In the case of **United States v. Gradwell**, 243 U. S. 476, 61 L. ed. 861, the indictment in question was almost identical with the ones herein involved. Indictment 775 in the **Gradwell** case re-

lated to the conduct of a primary election held in the State of West Virginia in 1916. In the indictment twenty defendants were charged with conspiracy to defraud the United States in the matter of its governmental right to have a candidate of the true choice and preference of the Republican and Democratic parties nominated for said office and one of them elected, by causing and procuring a large number of persons who had not resided in the state a sufficient length of time to entitle them to vote under the state law, to vote at the primary for a candidate named, and also to procure four hundred of such persons to vote more than once at such primary election. Indictment 776 charged that the same defendants, named in 775, conspired to injure and oppress White, Sutherland and Rosenbloom, three candidates for the Republican nomination for United States Senator, who were voted for at the primary election held in West Virginia, under a state law of that state, by depriving them of the right and privilege of having each Republican voter vote, and vote once only, for some one of the Republican candidates for such nomination, and of not having any votes counted at such election except such as were cast by Republican voters duly qualified under the West Virginia law. It was further charged that the defendants conspired to accomplish this result by procuring a thousand persons, who were not qualified to vote under the state law, because they had not resided in that state a sufficient length of time, to vote for an opposing candidate. Demurrers filed to the indictments were sustained and the case appealed.

In discussing section 19 of the Criminal Code, this Court said:

> "Whatever doubt may at one time have existed as to the extent of the power which Congress may exercise under this constitutional sanction in the prescribing of regulations for the conduct of elections for Representatives in Congress, or in adopting regulations

which states have prescribed for that purpose, has been settled by repeated decisions of this court. Although Congress has had this power of regulating the conduct of congressional elections from the organization of the government, our legislative history upon the subject shows that except for about twenty-four of the one hundred and twenty-eight years since the government was organized, it has been its policy to leave such regulations almost entirely to the states, whose representatives Congressmen are. For more than fifty years no congressional action whatever was taken on the subject until 1842, when a law was enacted requiring that Representatives be elected by districts (5 Stat. at L., p. 491, chap. 47), thus doing away with the practice which had prevailed in some states of electing on a single state ticket all of the members of Congress to which the state was entitled.

"Then followed twenty-four years more before further action was taken on the subject, when Congress provided for the time and mode of electing United States Senators (14 Stat. at L. 243, chap. 245) and it was not until four years later, in 1870, that for the first time, a comprehensive system for dealing with congressional elections was enacted.

"These laws provided extensive regulations for the conduct of congressional elections. They made unlawful false registration, bribery, voting without legal right, making false returns of votes cast, interfering in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or Federal law; they provided for appointment by circuit judges of the United States of persons to attend at places of registration and at elections, with authority to challenge any person proposing to register or vote unlawfully, to witness the counting of votes, and to identify by their signatures the registration of voters and election tally sheets; and they made it lawful for the marshals of the United States to appoint special deputies to preserve order at such elections, with authority to arrest for any breach of the peace committed in their view.

"These laws were carried into the revision of the United States Statutes of 1873-74, under the title, 'Crimes against the Elective Franchise and Civil Rights of Citizens,' Rev. Stat. 5506 to 5532.

"It will be seen from this statement of the important features of these enactments that Congress by them committed to Federal officers a very full participation in the process of the election of Congressmen, from the registration of voters to the final certifying of the results, and that the control thus established over such elections was comprehensive and complete. It is a matter of general as of legal history that Congress, after twenty-four years of experience, returned to its former attitude towards such elections, and repealed all of these laws with the exception of a few sections not relevant here."

In discussing the attempt upon the part of the Government to make section 19 of the Criminal Code applicable to the casting of illegal ballots, the Court further said:

"Here, again, confessedly, an attempt is being made to make a new application of an old law to an old type of crime, for sec. 19 has been in force, in substance, since 1870 but has never before been resorted to as applicable to the punishment of offenses committed in the conduct of primary elections or nominating caucuses or conventions, and the question presented for decision is:

"Did the candidates named in the indictment have such a right under the applicable West Virginia law that a conspiracy to corrupt the primary election held under that law on the 6th day of June 'injured and oppressed' them within the meaning of sec. 19 of the Federal Criminal Code?

"That this sec. 19 of the Criminal Code is applicable to certain conspiracies against the elective franchise is decided by this Court in United States v. Mosley, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904, but that decision falls far short of making the section applica-

ble to the conduct of a state nominating primary, and does not advance us far towards the claimed conclusion that illegal voting for one candidate at such a primary so violates a right secured to the other candidates by the United States Constitution and laws as to constitute an offense within the meaning and purpose of the section."

While the **Gradwell** Case decides that section 19 has no application in primaries, it goes further and arrives at the conclusion that section 19, relied on herein, was enacted for the protection of civil rights of the then late enfranchised Negro and cannot be extended to make it an agency for enforcing the State primary law such as was then in force in West Virginia.

The case of **United States v. Mosley**, 238 U. S. 383, 59 L. ed. 1355, 35 Sup. Ct. Rep. 904, referred to in the **Gradwell** Case, merely holds that section 19 of the Criminal Code was constitutional and that it guaranteed the right to the individual "to vote and to have his vote counted as cast." The **Gradwell** Case follows the case of **Newberry v. United States**, 256 U. S. 232, which, in effect, held that Congress had no right to legislate as to primaries, whereas in the **Gradwell** Case it was distinctly held that Congress had the right to legislate with reference to primaries, but it had not done so and consequently section 19 did not apply to primaries. However, the real interpretation of the **Gradwell** Case is that section 19 merely protects the "personal right" of the voter and did not extend beyond that point.

A great effort is made by counsel for appellant to distinguish the **Bathgate** Case from the one under consideration. The conclusions reached by the Government, we believe, are entirely erroneous. In the case of **United States v. Bathgate**, 246 U. S. 220, 62 L. ed. 679, six cases were involved alleging a conspiracy to injure and oppress, in violation of sec. 19 of the Criminal Code. Two counts of the indictments charged the defendants with conspiracy to

injure candidates for presidential electors, the United States Senate and representative in Congress at the regular election in Ohio in 1916, "also qualified electors" who might properly vote thereat, in the free exercise and enjoyment of certain rights and privileges secured by the Constitution and laws of the United States, viz.: the right (a) of being a candidate; (b) that only those duly qualified should vote; (c) that the results should be determined by voters who had not been bribed, and (d) that the election board should make a true and accurate count of votes legally cast by qualified electors and no others. The indictment further alleged the conspiracy was carried into effect as intended by purchasing votes of certain electors and causing election board to receive them and make inaccurate returns.

At this point we call the Court's attention to the fact that the allegations in the indictment in the **Bathgate** Case are identical with those in the cases now before this Court.

In deciding that section 19 was not applicable, the Court in the **Bathgate** case stated:

> "The government in effect maintains that lawful voters at an election for presidential electors, senator and member of Congress, and also the candidates for those places, have secured to them by Constitution or laws of the United States the right and privilege that it shall be fairly and honestly conducted; and that Congress intended by sec. 6, Act of 1870, to punish interference with such right and privilege through conspiracy to influence voters by bribery.
>
> "Section 19, Criminal Code, of course, now has the same meaning as when first enacted as sec. 6, Act of 1870, and considering the policy of Congress not to interfere with elections within a state except by clear and specific provisions, together with the rule respecting construction of criminal statutes, we cannot think it was intended to apply to conspiracies to bribe voters. Bribery, expressly denounced in another section

of the original act, is not clearly within the words used; and the reasoning relied on to extend them thereto would apply in respect of almost any act reprehensible in itself, or forbidden by state statutes, and supposed injuriously to affect freedom, honesty, or integrity of an election. This conclusion is strengthened by express repeal of the section applicable to bribery, and we think is rendered entirely clear by considering the nature of the rights or privileges fairly within intendment of original sec. 6.

"'The right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudiciable one common to all, that the public shall be protected against harmful acts, which is here relied on. The right to vote is personal, and we have held it is shielded by the section in question.''

As we construe the **Bathgate** Case, it decides that the act of 1894 stripped the United States of any participation in nominating primaries or in final elections other than the right to protect the Constitutional right of each voter to the end that he be permitted unoppressed to cast his vote and to have it counted as cast. This, we believe, is the extent to which section 19 is applicable, and if our interpretation of the statute in question is correct, the indictments rendered herein fall far short of making section 19 applicable to these cases.

The Government maintains that the effects of casting spurious ballots and of altering or failing to count ballots legally cast are identical. We cannot conceive how this position is tenable.

As decided in the Bathgate Case, Section 19 of the Civil Code merely protects the individual in his right to vote and have his vote counted as cast, and that the inclusion of bribed votes in the ballot box with legal votes does not constitute a Federal offense.

What is a spurious vote? The meaning is apparent. A spurious vote is an illegal one. A bribed vote is an illegal one. Both stand on the same footing. The casting of either dilutes, to the same extent, the value and effect of the legal votes. How, then, in view of the **Bathgate** Case, can it be successfully argued by the Government that bribed votes change the value and effect of the legal votes any more than the votes of fictitious persons?

How, then, can it be contended that the casting of spurious or fictitious ballots is any more a Federal offense than the voting of bribed votes?

Either both are Federal offenses or neither is, and we maintain that the decision in the **Bathgate** Case is a complete answer to the questions hereinabove propounded.

The **Bathgate** Case has been interpreted by various Circuit Courts of Appeals.

In the case of **United States v. Kantor**, 78 Fed. (2) 710, the appellants were convicted for conspiracy to injure, oppress, threaten and intimidate citizens in the exercise of their civil rights of voting. Appellant, Kantor, was the treasurer of a campaign committee with a duty to distribute money to the captains for the purpose of paying workers on election day. The government's case was predicated on the contention that the appellants interfered with voters at the machines, rang up votes on the machines, forged signatures of voters, and turned the voting machines in improper positions in the polling places.

The question presented in that case was, whether the indictment was sufficient and whether there was error in ruling at the trial. The lower court charged that conviction might be had if the jury found injury to voters who were entitled to vote for a representative at large in Congress and for a representative in Congress and for a United States Senator. The evidence at the trial showed forged signatures and that votes were rung up without the formality of signing the poll book. Over the appellant's

exception, the court below charged that legal voters were injured, saying:

> "If by reason of the fact that people who are disqualified are permitted to vote, from the machinations and arrangements of persons who may be in control of the election at this particular place, then my one vote does not count, as it should in the general result, the person so injured is within the protection of this statute, and if people conspire to injure a person in that way, they come within the prohibitions of the statute."

After deliberation, the jury returned for further instructions, and the court charged that:

> "If some of these people who are said not to have had the right to vote did vote here, or if someone improperly rung up votes, that that may be considered an injury to a person who had a right to vote and to have his vote counted, and to that extent that votes were unlawfully cast, why there was an impairment of the right of those who were legally qualified and who had cast their votes, and thereby they may be said to be injured, because they were not getting the full value of their votes."

Exceptions were taken to the instructions, and the Circuit Court of Appeals, in deciding the charge erroneous, following the language of the **Bathgate** Case, said:

> "It is the individual voter who is protected. It is not every wrongful act, which alters the result of the election, which is punishable under the section of the statute. It must be some act intended to prevent some citizen from exercising his constitutional rights."

The Court further concluded that there was no injury to qualified voters by the inclusion of disqualified votes within the meaning of section 19 of the Criminal Code.

In determining that the judgment should be reversed, and that the instructions were erroneous, the Court, further quoting from the **Bathgate** Case, stated: "Illegal and disqualified voting was held no longer to be a federal offense."

Thus, it may be seen that the facts in the **Kantor** Case are identical with the facts in the case at bar, and the Circuit Court of Appeals, in following the decisions of the Supreme Court, unqualifiedly decided that the permitting of disqualified persons to vote, or the inclusion of improper votes for one candidate, is not a federal offense.

This is the same contention we make in this case. The position which we earnestly maintain is that there must be some violation of the personal right to the individual voter who presents himself at the polls. That, in order to come within the protection of section 19, there must either be a denial to him of his right to vote or there must be a failure to count his vote after it has been cast. There is no such allegation in the indictment in these cases, and the Government herein is merely proceeding under the theory that a "dilution" of the value of legal votes cast constitutes a federal offense.

We further call the Court's attention to the case of **Chavez v. United States**, 261 Fed. 174, wherein Chavez, among others, was convicted and sentenced for violating section 19 of the Criminal Code, which makes it a crime to conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States. The indictment therein charged that the defendants, who were the judges and clerks in a certain precinct in an election at which certain persons named were candidates for presidential electors, United States Senator and Representative in Congress, conspired to injure and oppress certain citizens of the United States in the free exercise and enjoyment of certain federal rights

and privileges, that is to say, the rights and privileges appertaining to the said several candidates, and to all the legally qualified voters at said election voting in said state of New Mexico. The indictment then states that "the right mentioned is of having all legal votes cast properly received, counted, and returned, of having only such votes cast, counted, and returned, and of having the election determined accordingly." Finally, there is a specification of the means and methods whereby defendants were to accomplish the object of the conspiracy.

In reversing the sentences, the Eighth Circuit Court of Appeals, following the language of the **Bathgate** Case, held that the federal rights or privileges protected by section 19 of the Criminal Code is a personal right, such as that of the individual voter to vote and to have his vote counted as cast, and not the general interest of the candidates, or of the electors or the public at large, in the proper conduct of the election.

In that case the Court said:

> "It needs but a glance at the language of the indictment above quoted to show that it proceeds upon a broad conception of the statute held in the **Bathgate** Case to be erroneous. The conspiracy charged is, in apt and express words, against the right of the candidates and the voters in the state at large—the right of the former as standing for office and of the latter not distinguishable from the general public interest."

The decision of the learned Judge in the **Chavez** Case follows our conception of the meaning, the scope and the applicability of section 19 of the Criminal Code, and that the intent of the statute is solely to give the right to a citizen to vote and have his vote counted as cast, and that there is no protection to any voter as to the final outcome of the election. In short, we maintain there must be some offense against the individual in his right to exercise his

constitutional privilege of voting and having his vote counted as cast.

This, we think, to be the true interpretation of the statute, because section 19 must be construed in the light of our national policy as emphasized by the repeal of the Enforcement Act, which repeal evidenced a return of election control to the states.

This Court has held that section 19 is limited and narrow, and has no general application to elections, as such, and is purely a statute punishing conspiracy to injure a citizen, not generally, but only in those cases where the contemplated injury is motivated by the existence of an individual federal right. Our position is further strengthened by the fact that under section 19 conspiracies must be personal in their essence. We call the Court's attention to the association of words in section 19: "Injure," "oppress," "threaten," "intimidate," "citizen," "his," "him." Each word is personal, not collective. Each word points toward the individual, and conspiracies under section 19 should correspond with the manifest spirit of the statute.

The learned District Judge in these cases rendered a memorandum opinion (R. 8, 9, 10). In that opinion he carefully analyzes the indictments, and in holding that the mere dilution of the value of one voter's vote by the inclusion in the ballot box of spurious votes is not a Federal offense, he states:

> "The question presented for decision was whether the right of qualified voters, at a Congressional election, to have the full value and effect of their votes secured free from impairment or dilution by forged or fictitious ballots fraudulently cast and counted for a candidate opposed to the candidate for whom they voted, is a Constitutional right to which Congress intended to afford protection by the provisions of section 19 of the Criminal Code of the United States.

"That the right of qualified citizens to vote in a Congressional election and to have their votes counted as cast are rights 'secured by the Constitution' within the meaning of and protected by section 19 of the Criminal Code, is not open to question. Ex parte Yarbrough, 110 U. S. 651; United States v. Mosely, 238 U. S. 383. Where a primary election is an integral part of the procedure for choosing a representative in Congress, the same rights of voters are protected by the same statute (United States v. Classic, 313 U. S. 299).

"But these cases seem to fall far short of making the Federal Statute applicable to the character of conduct charged in this indictment.

"In United States v. Bathgate, 246 U. S. 220, in holding the Federal Statute not applicable to a conspiracy to bribe voters at a general Congressional election, the Court pointed out that by the Act of February 8, 1894, 28 Stat. 36, repealing various provisions of the Act of 1870, which prescribed a comprehensive system to secure freedom and integrity of elections, Congress evidenced its policy 'to leave the conduct of elections at which its members are chosen to state law alone, except where it may have expressed a clear purpose to establish some further or definite regulation' and that, in the light of this policy, section 19 of the Federal Criminal Code was not intended to apply to or protect the general public from all reprehensible acts tending to injuriously affect the freedom, honesty and integrity of Congressional elections, but 'the right or privilege to be guarded, as indicated both by the language employed and context, was a definite, personal one, capable of enforcement by a court, and not the political, nonjudicable one common to all that the public shall be protected against harmful acts, * * *.'

"The strict construction and limited application thus placed upon the statute is controlling here and requires that the demurrer to the indictment be sustained upon the ground that section 19 of the Criminal

Code of the United States, as so construed, does not apply to or embrace a conspiracy to commit the acts charged in the indictment. There is no Federal statute which covers the reprehensible election fraud commonly referred to as 'ballot-box stuffing.' According to the established policy of Congress, as interpreted by the Supreme Court in the Bathgate case, the protection of the public from such type of election crimes is left to State laws (United States v. Gradwell, 253 U. S. 476; Chavez v. United States, 261 F. 174 (8 Cir.); United States v. Kantor, 78 F. (2d) 810 (2 Cir.); Steedle v. United States, 85 F. (2d) 867 (3 Cir.)."

Counsel for appellant undertakes to make applicable to this case the decision of this Court in the case of **United States v. Classic**, 313 U. S. 299. An examination of that case will clearly demonstrate that there is no similarity between the cases. The **Classic** Case, in effect, reverses the decisions in the **Gradwell** and **Newberry** Cases, and decides that, since a primary in the State of Louisiana is an integral part of the election, Section 19 of the Criminal Code affords the same protection to the individual voter in a primary election as it does in final elections. In addition to that, the overt act charged in the **Classic** Case was that the appellees altered eighty-three ballots cast for one candidate and fourteen cast for another, marking and counting them as votes for a third candidate, and that they falsely certified the number of votes cast for the respective candidates to the chairman of the Second Congressional District Committee. We readily concede that, since there was an alteration of eighty-three votes, that eighty-three persons were deprived of their constitutional rights to vote and have their votes counted as cast, but such is not the case before the Court at this time. As the Court said in the **Classic** Case:

"But we are now concerned with the question whether the right to choose at a primary election, a

candidate for election as representative, is embraced in the right to choose representatives secured by Article 1, Sec. 2."

Since eighty-three legal voters had their ballots changed to votes for the opposite candidate, this Court said:

> "The injury suffered by the citizens in the exercise of their right is an injury which the statute described and to which it applies in the one case as in the other."

In the dissenting opinion of Mr. Justice Douglas, in which Mr. Justice Black and Mr. Justice Murphy joined, it is stated:

> "Civil liberties are too dear to permit conviction for crimes which are only implied and which can be spelled out only by adding inference to inference. Section 19 does not purport to be an exercise of Congress of its power to regulate primaries. It merely penalizes conspiracies 'to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States.'"

What is that privilege secured to the individual citizen by the Constitution of the United States? It is the privilege of suffrage. It is the privilege of voting unoppressed, and having his vote counted as cast.

Mr. Justice Douglas in his dissenting opinion, further states:

> "While they protect the right to vote and the right to have one's vote counted at the final election as held in the Yarbrough and Mosley Cases, they certainly do not per se extend to all acts which in their indirect or incidental effect restrain, restrict, or interfere with that choice. Bribery of voters at a general elec-

> tion certainly is an interference with that freedom of choice. It is a corruptive influence which for its impact on the election process is as intimate and direct as the acts charged in this indictment. And Congress has ample power to deal with it. But this Court in United States v. Bathgate, 246 U. S. 220, 62 L. ed. 676, 38 S. Ct. 269, by a unanimous vote, held that conspiracies to bribe voters at a general election were not covered by Sec. 19."

This statement in the dissenting opinion is in direct accord with our contention in this case, that, while the statute protects the right of the citizen to vote and have his vote counted as cast, section 19 does not in itself per se extend to all acts which have an effect upon the final outcome of the election. This portion of the dissenting opinion directly contradicts the contention of the Government wherein it alleges that spurious votes are in the same class as votes which are not counted when legally cast. This contention upon the part of the Government is an effort to extend the statute far beyond its intended meaning.

Mr. Justice Douglas in his dissenting opinion further states:

> "In terms of casual effect tampering with the primary vote may be as important on the outcome of the general election as bribery of voters at the general election itself. Certainly from the viewpoint of the individual voter there is as much a dilution of his vote in the one case as in the other. So, in the light of the Mosley and Bathgate Cases, the test under Sec. 19 is not whether the acts in question constitute an interference with the effective choice of the voters. It is whether the voters are deprived of their votes in the general election. Such a test comports with the standards for construction of a criminal law, since it restricts Sec. 19 to protection of the rights plainly and directly guaranteed by the Constitution."

In addition to this, the dissenting opinion further states:

> "The Mosley Case, in my view, went to the verge when it held that Sec. 19 and the relevant constitutional provisions made it a crime to fail to count votes cast at a general election."

We believe that the **Classic** Case not only does not sustain the contention of appellant in these cases, but directly opposes it. In the **Classic** Case the decision made section 19 applicable to primaries as well as general elections, but, in addition to that, there was an entirely different feature involved, to wit: Eighty-three ballots cast by legal voters were changed and the votes counted for other candidates, and thus eighty-three persons had their constitutional right of voting and having their votes counted as cast violated. The **Classic** Case is not in any way applicable to this particular case, where there is no allegation in the indictments before the Court that any voter was denied the privilege of voting or that any voter failed to have his vote counted as cast.

In its final analysis, this case is submitted to the Court on the question of whether or not a legal voter has suffered any constitutional right of having the value of his vote diluted by the inclusion of his ballot in the ballot box with the ballots of illegal voters. The **Bathgate** Case, which was a unanimous opinion of this Court, states it is not an offense to include illegal votes with legal votes, and, since a bribed vote is just as illegal and just as spurious as a ballot placed in the box without a voter being present, the ruling in the **Bathgate** Case is controlling here and under the indictments there is no Federal offense charged.

CONCLUSION.

Based upon the allegations contained in the indictments herein and the law submitted, we maintain that the lower court properly sustained the demurrers. This conclusion is based upon the fact that nowhere in the indictments may be found any allegation that any voter was deprived of his right to vote and to have his vote counted as cast, and the only theory upon which the Government is proceeding is that a Federal offense is committed if the value and effect of one vote is diluted by commingling that ballot with an illegal one.

We respectfully submit that the orders of the Court below, sustaining the demurrers to the indictments, should be affirmed.

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P. 1.

SUPREME COURT OF THE UNITED STATES.

Nos. 716-717.—October Term, 1943.

The United States of America, Appellant,		
716	vs.	Appeals from the District Court of the United States for the Eastern District of Kentucky.
Clyde Saylor, et al.		
The United States of America, Appellant,		
717	vs.	
Clarence Poer, et al.		

[May 22, 1944.]

Mr. Justice Roberts delivered the opinion of the Court.

These cases come here under the Criminal Appeals Act. The District Court sustained demurrers to indictments for conspiracies forbidden by § 19 of the Criminal Code.[1] The section provides: "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, . . . they shall be punished.

As the cases present identical questions it will suffice to state No. 716. The indictment charged that a general election was held November 3, 1942, in Harlan County, Kentucky, for the purpose of electing a Senator of the United States, at which election the defendants served as the duly qualified officers of election; that they conspired to injure and oppress divers citizens of the United States who were legally entitled to vote at the polling places where the defendants officiated, in the free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States, namely, the right and privilege to express by their votes their choice of a candidate for Senator and their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified. The indictment charged that the defendants, pursuant to their plan,

[1] 18 U. S. C. § 51.

tore from the official ballot book and stub book furnished them, blank unvoted ballots and marked, forged, and voted the same for the candidate of a given party, opposing the candidate for whom the injured voters had voted, in order to deprive the latter of their rights to have their votes cast, counted, certified and recorded and given full value and effect; that the defendants inserted the false ballots they had so prepared into the ballot box, counted and returned them, together with the other ballots lawfully cast, so as to create a false and fictitious return respecting the votes lawfully cast.

The appellees demurred to the indictment, as failing to state facts sufficient to constitute a crime against the United States. The demurrer attacked the indictment on other grounds raising questions which, if decided, would not be reviewable here under the Criminal Appeals Act. The District Court decided only that the indictment charged no offense against the laws of the United States. This ruling presents the question for decision.

The appellees do not deny the power of Congress to punish the conspiracy described in the indictment. In the light of our decisions, they could not well advance such a contention.[2] The inquiry is whether the provision of § 19 embraces a conspiracy by election officers to stuff a ballot box in an election at which a member of the Congress of the United States is to be elected.

In *United States* v. *Mosley*, 238 U. S. 383, this court reversed a judgment sustaining a demurrer to an indictment which charged a conspiracy of election officers to render false returns by disregarding certain precinct returns and thus falsifying the count of the vote cast. After stating that § 19 is constitutional and validly extends "some protection at least to the right to vote for Members of Congress," the court added: "We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box." The court then traced the history of § 19 from its origin as one section of the Enforcement Act of May 31, 1870,[3] which contained other sections more specifically aimed at election frauds, and the survival of § 19 as a statute of the United States notwithstanding the repeal of those other sections. The conclusion

[2] Ex parte Yarbrough, 110 U. S. 651, 657, 658, 661, 663; United States v. Classic, 313 U. S. 299, 314, 315.

[3] c. 114, 16 Stat. 140, as amended by c. 99, 16 Stat. 433.

was that § 19 protected personal rights of a citizen including the right to cast his ballot, and held that to refuse to count and return the vote as cast was as much an infringement of that personal right as to exclude the voter from the polling place. The case affirms that the elector's right intended to be protected is not only that to cast his ballot but that to have it honestly counted.

The decision was not reached without a strong dissent, which emphasized the probability that Congress did not intend to cover by § 6 of the Act (now § 19) the right to cast a ballot and to have it counted, but to deal with those rights in other sections of the act. And it was thought this view was strengthened by the repeal, February 8, 1894,[4] of the sections which dealt with bribery and other election frauds, including § 4, which, to some extent, overlapped § 6, if the latter were construed to comprehend the right to cast a ballot and to have it counted. Notwithstanding that dissent, the *Mosley* case has stood as authority to the present time.[5]

The court below thought the present cases controlled by *United States* v. *Bathgate*, 246 U. S. 220. That case involved an indictment charging persons with conspiring to deprive a candidate for office of rights secured to him by the Constitution and laws of the United States, in violation of § 19, and to deprive other voters of their rights, by the bribery of voters who participated in an election at which members of Congress were candidates. This court affirmed a decision of the district court sustaining a demurrer to the indictment, and distinguished the *Mosley* case on several grounds: first, that, in the Enforcement Act, bribery of voters had been specifically made a criminal offense but the section so providing had been repealed; secondly, that the ground on which the *Mosley* case went was that the conspiracy there was directed at the personal right of the elector to cast his own vote and to have it honestly counted, a right not involved in the *Bathgate* case.

If the voters' rights protected by § 19 are those defined by the *Mosley* case, the frustration charged to have been intended by the defendants in the present cases violates them. For election officers knowingly to prepare false ballots, place them in the box, and count them, is certainly not honestly to count the votes lawfully cast. The mathematical result may not be the

[4] c. 25, 28 Stat. 36.

[5] United States v. Gradwell, 243 U. S. 476; In re Roberts, 244 U. S. 650; Hague v. C. I. O., 307 U. S. 496, 527; United States v. Classic, *supra*, 321.

same as would ensue throwing out or refusing to count votes lawfully cast. But the action pursuant to the conspiracy here charged constitutes the rendering of a return which, to some extent, falsifies the count of votes legally cast. We are unable to distinguish a conspiracy so to act from that which was held a violation of § 19 in the *Mosley* case.

It is urged that any attempted distinction between the conduct described in the *Bathgate* case and that referred to in the *Mosley* case is illogical and insubstantial; that bribery of voters as badly distorts the result of an election and as effectively denies a free and fair choice by the voters as does ballot box stuffing or refusal to count or return the ballots. Much is to be said for this view. The legislative history does not clearly disclose the Congressional purpose in the repeal of the other sections of the Enforcement Act, while leaving § 6 (now § 19) in force. Section 19 can hardly have been inadvertently left on the statute books. Perhaps Congress thought it had an application other than that given it by this court in the *Mosley* case. On the other hand, Congress may have intended the result this court reached in the *Mosley* decision. We think it unprofitable to speculate upon the matter for Congress has not spoken since the decisions in question were announced, and the distinction taken by those decisions has stood for over a quarter of a century. Observance of that distinction places the instant case within the ruling in the *Mosley* case and outside that in the *Bathgate* case.

Our conclusion is contrary to that of the court below and requires that the judgments be reversed.

So ordered.

Mr. Justice DOUGLAS, with whom Mr. Justice BLACK and Mr. Justice REED concur, dissenting.

The question is not whether stuffing of the ballot box should be punished. Kentucky has made that reprehensible practice a crime. See Ky. Rev. Stat. 1942, § 124.220; *Commonwealth* v. *Anderson*, 151 Ky. 537; *Tackett* v. *Commonwealth*, 285 Ky. 83. Cf. Ky. Rev. Stat. 1942, § 124.180(8). And it is a crime under Kentucky law whether it occurs in an election for state officials or for United States Senator. *Id.*, § 124.280(2). The question here is whether the general language of § 19 of the Criminal Code

should be construed to superimpose a federal crime on this state crime.

Under § 19 of the Enforcement Act of May 31, 1870 (16 Stat. 144) the stuffing of this ballot box would have been a federal offense.[1] That provision was a part of the comprehensive "reconstruction" legislation passed after the Civil War. It was repealed by the Act of February 8, 1894, 28 Stat. 36—an Act which was designed to restore control of election frauds to the States. The Committee Report (H. Rep. No. 18, 53d Cong., 1st Sess., p. 7) which sponsored the repeal stated:

"Let every trace of the reconstruction measures be wiped from the statute books; let the States of this great Union understand that the elections are in their own hands, and if there be fraud, coercion, or force used they will be the first to feel it. Responding to a universal sentiment throughout the country for greater purity in elections many of our States have enacted laws to protect the voter and to purify the ballot. These, under the guidance of State officers, have worked efficiently, satisfactorily, and beneficently; and if these Federal statutes are repealed that sentiment will receive an impetus which, if the cause still exists, will carry such enactments in every State in the Union."

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[1] That section provided:

"That if at any election for representative or delegate in the Congress of the United States any person shall knowingly personate and vote, or attempt to vote, in the name of any other person, whether living, dead, or fictitious; or vote more than once at the same election for any candidate for the same office; or vote at a place where he may not be lawfully entitled to vote; or vote without having a lawful right to vote; or do any unlawful act to secure a right or an opportunity to vote for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or otherwise unlawfully prevent any qualified voter of any State of the United States of America, or of any Territory thereof, from freely exercising the right of suffrage, or by any such means induce any voter to refuse to exercise such right; or compel or induce by any such means, or otherwise, any officer of an election in any such State or Territory to receive a vote from a person not legally qualified or entitled to vote; or interfere in any manner with any officer of said elections in the discharge of his duties; or by any of such means, or other unlawful means, induce any officer of an election, or officer whose duty it is to ascertain, announce, or declare the result of any such election, or give or make any certificate, document, or evidence in relation thereto, to violate or refuse to comply with his duty, or any law regulating the same; or knowingly and wilfully receive the vote of any person not entitled to vote, or refuse to receive the vote of any person entitled to vote; or aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit to do any duty the omission of which is hereby made a crime, or attempt to do so, every such person shall be deemed guilty of a crime, and shall for such crime be liable to prosecution in any court of the United States of competent jurisdiction; and, on conviction thereof, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment for a term not exceeding three years, or both, in the discretion of the court, and shall pay the costs of prosecution."

This Court now writes into the law what Congress struck out 50 years ago. The Court now restores federal control in a domain where Congress decided the States should have exclusive jurisdiction. I think if such an intrusion on historic states' rights is to be made, it should be done by the legislative branch of government. I cannot believe that Congress intended to preserve by the general language of § 19 the same detailed federal controls over elections which were contained in the much despised "reconstruction" legislation.

The Court, of course, does not go quite that far. It recognizes that bribery of voters is not a federal offense. *United States* v. *Bathgate*, 246 U. S. 220. But he who bribes voters and purchases their votes corrupts the electoral process and dilutes my vote as much as he who stuffs the ballot box. If one is a federal crime under § 19, I fail to see why the other is not also.

Congress has ample power to legislate in this field and to protect the election of its members from fraud and corruption. *United States* v. *Classic*, 313 U. S. 299. I would leave to Congress any extension of federal control over elections. I would restrict § 19 to those cases where a voter is deprived of his right to cast a ballot or to have his ballot counted. *United States* v. *Mosley*, 238 U. S. 383. That is the "right or privilege" the "free exercise" of which is protected by § 19. If it is said that that distinction is not a logical one, my answer is that it is nevertheless a practical one. Once we go beyond that point, logic would require us to construe § 19 so as to make federal offenses out of all frauds which corrupt the electoral process, distort the count, or dilute the honest vote. The vast interests involved in that proposal emphasize the legislative quality of an expansive construction of § 19. We should leave that expansion to Congress.

That view is supported by another consideration. The double jeopardy provision of the Fifth Amendment does not bar a federal prosecution even though a conviction based on the same acts has been obtained under state law. *Jerome* v. *United States*, 318 U. S. 101, 105, and cases cited. Therefore when it is urged that Congress has created offenses which traditionally have been left for state action and which duplicate state crimes, we should be reluctant to expand the defined federal offenses "beyond the clear requirements of the terms of the statute." *Id.* I know of no situation where that principle could be more appropriately recognized than in the field of the elections where there is comprehensive state regulation.